Supreme Court, U.S.
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No. ——

In The Supreme Court of the United States

AMERICAN HOME PRODUCTS CORPORATION,
Petitioner,

v.

STATE OF OREGON and DOUGLAS J. AXEN,
Respondents.

Petition for a Writ of Certiorari to the Court of Appeals of Oregon

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Eighth Amendment's Excessive Fines Clause, made applicable to the States by the Fourteenth, apply to an award against a pharmaceutical company of $20,000,000 punitive damages, of which by statute nearly half is paid to the State?

2. Are the Eighth and Fourteenth Amendments violated by a procedure that allows the trial judge to enter unchanged a jury's $20,000,000 punitive award without any articulation of standards or reasons?

LIST OF PARTIES

Petitioner American Home Products Corporation and respondents the State of Oregon and Douglas J. Axen were parties in the Court of Appeals of Oregon and the Supreme Court of Oregon. Sandra Axen also was a party in those courts; the judgment entered as to her is not challenged in this petition and she is not an interested party as to the petition. Wal-Mart Stores, Inc. was named as a defendant in the Circuit Court of Multnomah County, Oregon, but the complaint as to it was dismissed by that court by consent; Wal-Mart Stores, Inc. was listed in the caption in the Court of Appeals and Supreme Court of Oregon as a "defendant," but had no role in those proceedings and has no interest in this matter.

LIST PURSUANT TO RULE 29.6

American Home Products Corporation is a Delaware corporation whose stock is publicly traded. It has no parent companies. It has the following non-wholly-owned subsidiaries: Immunex Corporation; Geoffrey Manners & Co., Ltd.; Cyanamid (Pakistan) Limited; and Wyeth Lederle Limited.

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Petition for a Writ of Certiorari to the Court of Appeals of Oregon

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PETITION FOR A WRIT OF CERTIORARI

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of Oregon entered in this case on February 10, 1999, and adhered to on reconsideration April 21, 1999.

OPINIONS BELOW

The initial opinion of the Court of Appeals is reported at 158 Or. App. 292 and 974 P.2d 224 and is reproduced in the Appendix at A. 2a. The opinion of the Court of Appeals on reconsideration is reported at 160 Or. App. 19 and 981 P.2d 340 and is reproduced at A. 43a. The order of the Supreme Court of Oregon denying review is unreported and is reproduced at A. 1a.

JURISDICTION

The judgment of the Court of Appeals of Oregon was entered February 10, 1999. Its opinion granting recon-

sideration and adhering to the judgment was entered April 21, 1999. A timely petition for review was denied by the Supreme Court of Oregon on September 28, 1999. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent portions of the Eighth and Fourteenth Amendments to the Constitution of the United States, and Or. Rev. Stat. § 18.540 in its previous and present versions, are reproduced in the appendix at A. 59a-62a.

STATEMENT

This petition challenges the constitutionality under the Eighth and Fourteenth Amendments of an award of $20,000,000 punitive damages, of which Oregon law requires that half be paid to the State of Oregon.

A. Trial Court Proceedings.

In 1985, after being urged to do so by the U.S. Food and Drug Administration, petitioner made available in the United States the drug amiodarone (trade-named Cordarone) as a treatment for certain severe, life-threatening cardiac arrhythmias for which no other effective medication was available. The package insert accompanying the drug characterized it as a treatment of last resort because of the risk of many side effects, some potentially fatal, including pulmonary toxicity, liver damage, and sometimes even exacerbated cardiac conditions. None of thousands of case studies as of 1985 had shown any reason to believe amiodarone could affect the optic nerve. In 1987 an article reported swelling of the nerve in thirteen persons treated with amiodarone, calling this only an "association" rather than causation, and noting that "the disorder could be due to chance alone." Never-

theless, after petitioner's staff physician in charge of labeling conferred with the principal author of the article, petitioner amended the package insert in 1988 to add a warning of risks of "optic neuritis," a term the article had used to describe the condition it reported, and which the author said was accurate.

In 1994 respondent Axen, then aged fifty-six, collapsed while running. His treating cardiologist diagnosed his condition as severe and life-threatening cardiac arrhythmia, and recommended Cordarone. His physicians explained to him the potential side effects listed in the package insert. He followed their advice. Two months later he began having vision problems, which his ophthalmologist diagnosed as "optic neuritis." He then stopped using Cordarone. His eyesight continued to deteriorate thereafter, leaving him with limited vision in both eyes that was within the definition of legal blindness.

In 1995 he brought suit in the Circuit Court of Multnomah County, Oregon against petitioner and others,[1] seeking compensatory damages and also $20,000,000 punitive damages.[2] The complaint alleged that his vision loss had been caused by amiodarone. No peer-reviewed study had ever concluded that amiodarone can cause loss of

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[1] The original complaint also sought damages for negligence against Wal-Mart Stores, Inc. (retailer of the drug to respondent) and the State of Oregon (operator of the hospital where respondent's treating physicians practiced). Those claims were dismissed by consent by the trial court. See A. 3a n.1.

[2] Also a plaintiff was his wife, who sought damages for loss of consortium; the jury awarded her $936,392, which the Court of Appeals reduced to $500,000, holding that her claimed lost earnings were not recoverable as loss of consortium under Oregon law. See A. 24a. Her portion of the judgment is not at issue in this petition.

vision. The complaint further claimed that although the package insert had warned of many extremely dangerous side effects, as well as "optic neuritis," nevertheless it had been inadequate because the warning did not use the term "optic neuropathy." Respondent Axen presented experts to testify that in their opinion his condition should be called "optic neuropathy;" one of them, however, conceded that scientists and physicians consider the terms "optic neuritis" and "optic neuropathy" interchangeable, and other experts also so testified.

Although advertising was not mentioned in the complaint, the trial court over objection allowed as evidence for punitive damages a press release issued by a United States Senator attacking petitioner and other pharmaceutical companies for aggressive advertising and referring to Cordarone, and also two admonitory letters from FDA staff members critical of advertising. None of those documents contained any reference to optical risks, and the FDA criticisms were promptly resolved to the FDA's satisfaction. There was no evidence that advertising of Cordarone had been seen by any physician treating respondent. Respondent Axen's closing argument urged that petitioner should be punished for "a flagrantly abusive campaign for Cordarone" to "generate higher revenues" thereby "putting patients at risk." The jury awarded him $407,265.75 as "economic damages," plus $1,500,000 as "noneconomic damages." In addition, it awarded the $20,000,000 punitive punitive damages he had requested.

B. The Trial Court's Rulings.

Petitioner moved for judgment notwithstanding the verdict and alternatively for a new trial. Petitioner argued that the punitive award violated the Eighth Amendment's Excessive Fines Clause as incorporated in the Due Process

Clause of the Fourteenth Amendment. The Eighth Amendment was applicable, petitioner argued, because Oregon law required that half of the punitive damages award be paid to the State. Petitioner also moved that the trial court review the verdict under *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1 (1991), and *Honda Motor Co.* v. *Oberg*, 512 U.S. 415 (1994), and that it set aside the $20,000,000 punitive damages as unconstitutionally excessive under the Due Process Clause of the Fourteenth Amendment as construed in *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559 (1996).

The trial court heard oral argument on the motion, during which it asked no questions and made no comments on the punitive award, other than to state at the conclusion:

> "The written documents submitted by both sides have been most helpful, very lengthy, very comprehensive, and, again, post-verdict, in view of the size of the verdict, I've given considerable thought to the rulings that the parties raised this morning.
>
> "But I've come to the conclusion that I'm satisfied that the rulings that I made were appropriate, and the motion for a new trial and the motion for a judgment notwithstanding the verdict will be denied."

A. 56a. The court then signed a form order prepared by respondent's counsel which recited that the court had "heard the arguments of counsel and considered the memoranda and documents submitted by the parties in support of their respective positions, and the trial court's file," and that the motion was denied. A. 57a-58a.

An Oregon statute, Or. Rev. Stat. § 18.540, required that 50% of all awards of punitive damages in Oregon

after deduction of attorney's fees be paid to the Criminal Injuries Compensation Account of the State of Oregon. Accordingly, the trial court entered judgment designating the State of Oregon as a judgment creditor as to its portion of the punitive damages. A. 53a. The State issued a demand for payment, and gave notice that "The Department of Justice is now an interested party in this proceeding." [3]

C. The Court of Appeals' Opinions.

After rejecting most of petitioner's state-law objections, the Court of Appeals concluded that the Eighth and Fourteenth Amendment "constitutional arguments have been preserved sufficiently for our review." A. 31a. Addressing the Eighth Amendment issue, the court at first held:

> "We conclude that, in the case of a civil award of punitive damages, the excessive fines analysis is subsumed by the due process analysis dictated by the court in *BMW*. Because we have concluded that the award here does not violate due process, we need not separately address whether the award imposes an excessive fine."

A. 42a n.28. Granting reconsideration, however, the Court of Appeals issued a superseding opinion, in which it announced that its prior Eighth Amendment analysis had been in "error . . . because the issues are analytically distinct." A. 46a. Relying on a prior Oregon deci-

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[3] Letter from Assistant Attorney General Preston to Margaret A. Hoffman, *et al.*, May 7, 1997. A cross-appeal by respondent Axen against the State, challenging the designation of the State as a judgment creditor, was dismissed on joint motion of the State and respondent Axen. See A. 3a n.1.

sion,[4] it then held that the Eighth Amendment "did not apply to a civil case in which the government has no *prosecutorial* role." A. 47a (emphasis in original).

> "[B]ecause the State of Oregon had no role in intiating or prosecuting the action, there was no opportunity for governmental abuse of its prosecutorial power and, therefore, no Eighth Amendment violation." *Id.*

With respect to the trial court's failure to announce any standards or reasoning, the Court of Appeals held that

> "The United States Supreme Court has concluded that a trial court need not articulate its reasons for upholding a punitive damage award, as long as the record indicates that the court gave the parties an adequate hearing and considered their arguments."

A. 34a. Acknowledging that "the court did not refer specifically to AHP's due process claims," it concluded that "the record indicates that the court was mindful of the claims when it made its final rulings on post-verdict issues." A. 35a. In any event, it held, citing Oregon authority, the Constitution is satisfied by appellate review in the first instance:

> "because the constitutional issue is purely a legal issue, the trial court's reasoning in support of its decision, while helpful, has no direct bearing on our review."

Id. The Court of Appeals then proceeded to conclude: (1) Petitioner's conduct showed "a high degree of reprehensibility," A. 37a, in part because petitioner had "notice

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[4] *Tenold* v. *Weyerhaeuser Co.*, 127 Or. App. 511, 873 P.2d 413 (1994) (in banc), *review dismissed*, 321 Or. 561, 901 P.2d 859 (1995).

that the federal government was concerned with AHP's labeling and advertising practices," *id.*—even though there was no evidence whatsoever that the FDA had ever objected to the label's warning on optical side effects, or asked that it be changed. (2) The ratio of punitive damages to the compensatory damages awarded to respondent Axen—exceeding 10.5 to 1—was "not, in itself, unconstitutional." A. 40a & n.26. (3) The court held that maximum criminal or civil penalties, which it assumed to be $60,000, did not affect the constitutionality of the $20,000,000 judgment.[5] Oregon's punitive damage criteria, it said, "do not require juries to correlate their awards with potential criminal and administrative penalties." A. 42a n.27. Such comparison was "arguably undercut[]," the court added, because Oregon's punitive-damage "statute represents a legislative endorsement of punitive damages, as long as those damages are awarded in accordance with the relevant statutes." *Id.* Petitioner timely petitioned the Supreme Court of Oregon for review of these federal constitutional holdings, which was denied. A. 1a.

REASONS FOR GRANTING THE WRIT

This case sharply focuses the important constitutional question that this Court pointed out, but did not have occasion to rule upon, in *Browning-Ferris Industries of Vermont, Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257 (1989). In that case this Court held that the Eighth Amendment's prohibition of excessive fines does not apply to punitive

[5] Although acknowledging that "we can only speculate," A. 41a, the court suggested as an appropriate comparison the nationwide loss of revenue it assumed that the manufacturer would incur if the FDA seized the drug or banned it—something the FDA, which had urged petitioner to market Cordarone in the first place, never took any action to do.

damages that are awarded entirely to a private party. This Court reasoned that "the Excessive Fines Clause was intended to limit only those fines directly imposed by, and payable to, the government." 492 U.S. at 268. This Court explicitly restricted its Eighth Amendment holding to cases in which "the government has no share in the recovery." *Id.* at 272.

In the present case, unlike *Browning-Ferris*, a state government by state law has been assigned nearly half of a $20,000,000 punitive award. Yet the Oregon court, following Oregon precedent, refused to apply the Eighth Amendment, ignoring the clear reasoning of *Browning-Ferris* and subsequent decisions of this Court. The Oregon court's holding—which is irreconcilable also with recent state and federal decisions—is significant because so many States now are enacting statutes to assure that their governments will receive a share of every punitive-damage recovery. Clearly the Eighth Amendment intended that if a State—like the King of England in earlier times—chooses by statute to profit from money extracted by its courts as punishment, it cannot escape the substantive protection against "excessive fines" that that Amendment made part of the Constitution.

The decision also negates a separate constitutional safeguard provided by the Due Process Clause as well as the Eighth Amendment. Here the trial judge, acknowledging no standards whatsoever, and giving no reasons, simply rubber-stamped a $20,000,000 punitive award. The Court of Appeals held that this did not matter: that "a trial court need not articulate its reasons for upholding a punitive damage award." A. 34a. Again following Oregon precedent, it held that any omission in trial-court review is cured by the appellate court's own review. That holding is contrary to this Court's clear directive in

Pacific Mut. Life Ins. Co. v. *Haslip*, 499 U.S. 1, 20, 23 (1991), and *Honda Motor Co.* v. *Oberg*, 512 U.S 415, 420 (1994).

I. THIS CASE PRESENTS THE EIGHTH AMENDMENT ISSUE POINTED OUT BY THIS COURT IN *BROWNING-FERRIS* v. *KELCO.*

A. The Oregon Decision Rejects the Reasoning of *Browning-Ferris.*

This Court's opinion in *Browning-Ferris* explicitly recognized that "punitive damages awarded to the Government in a civil action may raise Eighth Amendment concerns." 492 U.S. at 275 n.21. At issue there were punitive damages paid solely to a private party. This Court held that "at the time of the drafting and ratification of the Amendment, the word 'fine' was understood to mean a payment to a sovereign as punishment for some offense." *Id.* at 265 (footnote omitted). After reviewing the history of the Eighth Amendment and its antecedents, this Court held that the Excessive Fines Clause does not apply

> "in a case where a private party receives exemplary damages from another party, *and the government has no share in the recovery.*"

Id. at 272 (emphasis supplied).

Browning-Ferris, both in language and reasoning, contains a clear negative pregnant: that the same history and reasoning that exclude Excessive Fines Clause protection when the government has no share in the recovery, make the clause applicable when the government does. The separate opinion of Justice O'Connor, joined by Justice Stevens, pointed out that "the Court determines that the Excessive Fines Clause becomes relevant only

when some governmental entity is seeking to reap the benefits of a monetary sanction," 492 U.S. at 298, and that

> "*the Court suggests* (despite its claim, *ante*, at 275-276, n.21, that it leaves the question open) *that the Excessive Fines Clause will place some limits on awards of punitive damages that are recovered by a governmental entity*. See, *e.g.*, Fla. Stat. § 768.73 (2)(b) (1987) (60% of any award of punitive damages is payable to the State)."

Id. at 298-99 (opinion of O'Connor, J.) (emphasis supplied).

There is no doubt that statutes like Oregon's "reap the benefits of a monetary sanction." See *McBride* v. *General Motors Corp.*, 737 F. Supp. 1563, 1569 (M.D. Ga. 1990) (noting "the State's advice that the . . . Act furthers a governmental interest of generating revenue from the 75% of the award"); *Gordon* v. *State*, 608 So. 2d 800, 802 (Fla. 1992) (statute is designed "to allot to the public weal a portion of damages designed to deter further harm"), *cert. denied*, 507 U.S. 1005 (1993). In fact, Oregon in 1995 amended the statute to increase its share from 50% of punitive damages after deducting attorneys' fees, to 60% of the amount before attorneys' fees.[6]

Thus this petition clearly presents the very situation this Court identified, but did not have occasion to rule upon, in *Browning-Ferris*. This is only the latest case in which Oregon has effectively overruled the substance of *Browning-Ferris*, by ignoring the Eighth Amendment on the rationale that the government was not "directly involved in the initiation and prosecution of the action." A. 47a n.2. See *Tenold* v. *Weyerhaeuser Co.*, 127 Or. App.

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[6] 1995 Or. Laws 688, § 1; A. 61a, *infra*. Respondent Axen filed suit one day before the increase to 60% became effective.

511, 529, 873 P.2d 413, 424 (1994) (en banc) ("[t]he government of Oregon did not initiate this action"), *review dismissed*, 321 Or. 561, 901 P.2d 859 (1995).[7] The decision here violates not only *Browning-Ferris*, but this Court's Eighth Amendment rulings since then. "We have . . . explained that at the time the Constitution was adopted, 'the word "fine" was understood to mean a payment to a sovereign as punishment for some offense.' " *United States* v. *Bajakajian*, 524 U.S. 321, 327 (1998), quoting *Browning-Ferris*, 492 U.S. at 265. "[T]he Excessive Fines Clause limits the government's power to extract payments, whether in cash or kind, as punishment for some offense." *Alexander* v. *United States*, 509 U.S. 544, 558 (1993), quoting *Austin* v. *United States*, 509 U.S. 602, 609-10 (1993), and also quoted in *Bajakajian*, 524 U.S. at 325. "The Eighth Amendment protects against excessive civil fines." *Hudson* v. *United States*, 522 U.S. 93, 103 (1997).

B. The Oregon Decision Conflicts With Decisions of Other Jurisdictions.

Oregon's holding that the Eighth Amendment does not apply unless the State prosecutes the case reflects a division in both reasoning and results among the state and federal courts. Oregon's rejection of the Eighth Amendment is contrary to the decision of the Supreme Court of Georgia in *Mack Trucks, Inc.* v. *Conkle*, 263 Ga. 539, 436 S.E.2d 635 (1993). There, in light of a Georgia statute that allocates 75% of the net punitive award to the State, Ga. Code Ann. § 51-12-5.1(e)(2), the Supreme Court of Georgia reviewed a punitive damage award for excessiveness under "the Eighth Amendment of the United

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[7] See Note, *Split-Recovery Statutes: The Interplay of the Takings and Excessive Fines Clauses*, 80 CORNELL L. REV. 104, 145 (1994) ("*Tenold* reached the wrong conclusion for at least two reasons").

States Constitution," even though the State had not prosecuted the case. 263 Ga. at 545, 436 S.E.2d at 640.[8]

However, Iowa, like Oregon, has held the Eighth Amendment inapplicable, although on different reasoning. Addressing a statute that requires payment of 75% of net punitive damages to "a civil reparations trust fund," Iowa Code § 668A.1(2)(b), the Supreme Court of Iowa held that "[w]e find a clear distinction between the Fund and the general state treasury," and that the Eighth Amendment does not apply as long as the State does not commingle punitive awards with revenues collected from other sources. *Spaur* v. *Owens-Corning Fiberglas Corp.*, 510 N.W.2d 854, 868 (Iowa 1994). The Eighth Circuit has questioned such reasoning:

> "We further express concern that the trust fund component of the Iowa statute may implicate . . . constitutional issues of due process and excessive fines . . . ."

Burke v. *Deere & Co.*, 6 F.3d 497, 512 n.26 (8th Cir. 1993), *cert. denied*, 510 U.S. 1115 (1994).[9] And the Supreme Court of Missouri earlier this year described as a "real and substantial" constitutional question whether

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[8] A federal district court in Georgia went further and concluded that "because the State of Georgia would have a right to receive a share of the damages awarded" the Georgia statute "will not pass constitutional muster under . . . the excessive fines clauses." *McBride* v. *General Motors Corp.*, *supra*, 737 F. Supp. at 1578, 1579.

[9] See also McAllister, *A Pragmatic Approach to the Eighth Amendment and Punitive Damages*, 43 KAN. L. REV. 761, 784 (1995) (calling reasoning of Iowa Supreme Court in *Spaur* "[i]ncredibl[e]"); *but cf.* Welles, *Charitable Punishment: A Proposal To Award Punitive Damages to Nonprofit Organizations*, 9 STAN. L. & POLICY REV. 203, 208 (1998) (arguing that statute requiring payment of punitive damages to charity "insulates it from the Excessive Fines Clause of the Eighth Amendment").

any payment of punitive damages to the State violates the Excessive Fines Clause. *Rodriguez* v. *Suzuki Motor Corp.*, 996 S.W.2d 47, 52-53 (Mo. 1999).

The Oregon ruling also is irreconcilable with decisions that apply the Excessive Fines Clause to limit penalties in *qui tam* actions under the False Claims Act, which authorizes suits by private persons for fraud against the government, with the government receiving a share of the penalties. 31 U.S.C. § 3730. This Court in *Browning-Ferris* pointed out that "[w]e leave the . . . question open" whether the Excessive Fines Clause applies to such actions. 492 U.S. at 276 n.21; see also *Austin* v. *United States, supra*, 509 U.S. at 607 n.3. Since then it has been assumed to apply to False Claims Act penalties. See *United States ex rel. Smith* v. *Gilbert Realty Co.*, 840 F. Supp. 71, 74 (E.D. Mich. 1993) (*qui tam* action); *cf. United States* v. *Advance Tool Co.*, 902 F. Supp. 1011, 1018 (W.D. Mo. 1995) (action by government) ("awarding Plaintiff $3,430,000.00 in civil penalties would be unconstitutionally excessive under the Eighth Amendment"), *aff'd*, 86 F.3d 1159 (8th Cir. 1996), *cert. denied*, 520 U.S. 1120 (1997).

C. The Excessive Fines Clause Applies Through the Fourteenth Amendment.

The opinion in *Browning-Ferris*, a federal-court case, noted that "We shall not decide whether the Eighth Amendment's prohibition on excessive fines applies to the several States through the Fourteenth Amendment, nor shall we decide whether the Eighth Amendment protects corporations as well as individuals." 492 U.S. at 276 n.22. The Oregon court assumed an affirmative answer to those questions, as have other courts. See, *e.g.*, *Pueblo School Dist.* v. *Toth*, 924 P.2d 1094, 1099 (Colo. App. 1996); *Thorp* v. *State*, 264 Ga. 712, 713, 450 S.E.2d

416, 417 (1994); *City of Milwaukee* v. *Arrieh*, 211 Wis. 2d 764, 771, 565 N.W.2d 291, 293-94 (Wis. App.), *review denied*, 212 Wis. 2d 688, 569 N.W.2d 589 (1997), *cert. denied*, 522 U.S. 1092 (1998).

This Court held in *Robinson* v. *California*, 370 U.S. 660 (1962), that the Eighth Amendment's prohibition of cruel and unusual punishment applies to the states, and assumed in *Schilb* v. *Kuebel*, 404 U.S. 357, 365 (1971), that the same is true for the Amendment's Excessive Bail Clause. There is no reason to treat the Amendment's prohibition of excessive fines any differently. See *Browning-Ferris*, 492 U.S. at 284 (opinion of O'Connor, J.) ("I see no reason to distinguish one Clause of the Eighth Amendment from another for purposes of incorporation").[10]

D. The Punitive Award Required Eighth Amendment Review.

This Court explained in *Browning-Ferris* that

> "Although the due process analysis of an award of punitive damages may track closely the Eighth Amendment analysis . . . we shall not assume that to be the case . . . ."

492 U.S. at 277 n.23. And the Court of Appeals acknowledged as "error," A. 46a, its initial view that "the excessive fines analysis is subsumed by the due process analysis." A. 42a n.28.[11]

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[10] Nor would there be any reason to exclude corporations from constitutional protection; the cases consistently assume that the Excessive Fines Clause applies to persons of all kinds. See, *e.g.*, *State* v. *WWJ Corp.*, 138 Wash. 2d 595, 604, 980 P.2d 1257, 1261 (1999); *United States* v. *All Assets*, 66 F.3d 483, 502 n.21 (2d Cir. 1995); Note, 49 VAND. L. REV. 1313 (1996).

[11] *But see Hilgedick* v. *Koehring Finance Corp.*, 8 Cal. Rptr. 2d 76, 99 n.10 (Cal. App. 1992) (Peterson, J., concurring) (assuming

Fines are punishments that particularly call for close judicial scrutiny. "[F]ines are a source of revenue," and "it makes sense to scrutinize governmental action more closely when the State stands to benefit." *Harmelin* v. *Michigan*, 501 U.S. 957, 979 n.9 (1991) (opinion of Scalia, J.); *cf. United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 26 (1977) ("complete deference . . . is not appropriate because the State's self-interest is at stake"). And a fine imposed by a jury calls for more careful review than one that is part of a sentence by a judge.

The Eighth Amendment's Excessive Fines prohibition, like its prohibition of cruel and unusual punishments, imposes a standard of proportionality. "If the amount of the forfeiture"—or fine—"is grossly disproportional to the gravity of the defendant's offense, it is unconstitutional." *United States* v. *Bajakajian*, *supra*, 524 U.S. at 337; see also *id.* at 348 (Kennedy, J., dissenting) (agreeing that "gross disproportion" is test under Excessive Fines Clause). And because "the State stands to benefit," therefore "[t]here is good reason to be concerned that fines, uniquely of all punishments, will be imposed in a measure out of accord with the penal goals of retribution and deterrence." *Harmelin* v. *Michigan*, *supra*, 501 U.S. at 979 n.9 (1991) (opinion of Scalia, J.).

The "constitutional requirement of proportionality review," *Bajakajian*, 524 U.S. at 339 n.14, under the Eighth Amendment should have been applied here, but it was not.

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that "the same methodology which is constitutionally sufficient to guard against excessive punitive damages under the due process clause would be sufficient to guard against excessive fines"), *review dismissed*, 1993 Cal. Lexis 3748 (1993) (not officially pub.).

1. First—and "particularly relevant" to Eighth Amendment review—"[i]n considering an offense's gravity, the other penalties that the Legislature has authorized are certainly relevant evidence." *Bajakajian*, 524 U.S. at 336, 339 n.14. Yet the Oregon court explicitly declined to give any weight at all to the disproportion between $20,000,000 punitive damages on the one hand, and the relevant statutory criminal penalties of $50,000 maximum (state law) and $10,000 maximum (federal law) on the other.[12] A. 40a-42a. The very existence of an open-ended punitive-damage statute, it explained, "arguably undercuts" the constitutional significance of specific statutory penalties. A. 42a n.27. *But see In re Forfeiture of: 1990 Chevrolet Blazer*, 684 So. 2d 197, 199 (Fla. App. 1996) (invalidating forfeiture under Excessive Fines Clause when "[t]he value of the Blazer was double the amount of the fine that could be imposed for the offense"), *review denied*, 695 So. 2d 699 (Fla. 1997).

2. The Excessive Fines Clause also requires an independent judicial scrutiny of the proportionality of the fine to the offense. Yet the Court of Appeals announced that "we decline to address whether there was sufficient evidence to show that AHP knew or should have known that amiodarone could cause optic neuropathy resulting in vision loss." A. 27a. It was undisputed that no peer-reviewed study ever concluded that amiodarone can cause vision loss. Nevertheless, there was a warning of optical side-effects, a warning which even one of respondent's experts conceded was stated in correct medical terminology. Such circumstances in many jurisdictions would as a

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[12] The maximum penalty under Oregon law for a corporation convicted of a felony is $50,000. Or. Rev. Stat. § 161.655(1). The maximum federal fine for failing to provide proper warnings for a drug, applicable only to cases of intentional fraud or after a previous conviction, is $10,000. 21 U.S.C. § 333(a)(2).

matter of law preclude punitive damages.[13] There was no evidence that petitioner's staff physician, who prepared the warning, or any other officer or employee of petitioner had been motivated by or even considered profit in adding the warning of "optic neuritis." The FDA (which had requested petitioner to market Cordarone) never in any respect criticized the warnings, which indeed it called "extraordinarily cautious." A. 7a.

3. The Eighth Amendment, no less than the Due Process Clause, surely limits a State's power to impose fines for unrelated lawful acts. See *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559, 572-73 (1996); *cf. Bordenkircher* v. *Hayes*, 434 U.S. 357, 363 (1978). Yet the trial court allowed criticisms of national advertising unrelated to optical side effects as evidence "for punitive damages," trial tr. 738, and the Court of Appeals held it was properly considered "for the purpose of determining the egregiousness of AHP's activities within Oregon," A. 32a, even though there was no evidence that any physician treating respondent had ever seen it.

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[13] See, *e.g.*, *Satcher* v. *Honda Motor Co.*, 52 F.3d 1311, 1317 (5th Cir. 1995) (punitive damages not authorized when scientific community in disagreement), *cert. denied*, 516 U.S. 1045 (1996); *Loitz* v. *Remington Arms Co.*, 138 Ill. 2d 404, 426, 563 N.E.2d 397, 407 (1990) (punitive damages improper when "the parties' expert witnesses disagreed"); *Bhagvandoss* v. *Beiersdorf, Inc.*, 723 S.W.2d 392, 398 (Mo. 1987) (good-faith warning, even if inadequate, precludes punitive damages).

II. OREGON, IN CONFLICT WITH DECISIONS OF OTHER JURISDICTIONS AND THIS COURT, FAILS TO FOLLOW THE CONSTITUTIONAL REQUIREMENTS FOR TRIAL-COURT REVIEW OF PUNITIVE DAMAGES.

The Oregon courts also have departed from the most basic procedural requirements of due process that were recognized by this Court in all its punitive-damage decisions beginning with *Pacific Mutual Life Ins. Co.* v. *Haslip*, 499 U.S. 1 (1991). Those requirements, based on the common law, include "*both* 'meaningful and adequate review by the trial court' *and* subsequent appellate review." *Honda Motor Co.* v. *Oberg*, 512 U.S. 415, 420 (1994) (emphasis supplied), quoting *Haslip, supra*, 499 U.S. at 20. Similarly, the Eighth Amendment requires review by "the district courts in the first instance, and the courts of appeals." *Bajakajian, supra*, 524 U.S. at 336. Oregon has taken away one of the two levels of review that this Court has held due process and the Eighth Amendment guarantee.

1. The Oregon court's ruling that inadequate review by the trial court did not matter, A. 34a-35a, a ruling in accord with other recent Oregon decisions, was plainly in conflict with decisions of this Court and courts of other states. In the face of this Court's holding in *Honda Motor Co.* v. *Oberg* requiring "both," 512 U.S. at 420, trial-court and appellate review, Oregon nevertheless holds that even if a trial court failed to provide constitutional review, the defect is cured by review at the appellate level. Thus the Supreme Court of Oregon, after this Court's remand in *Honda*, ruled that "[w]e are in as good a position as would be the trial court to apply a legal standard to the evidence in the record," and "an appellate court may conduct post-verdict review, on the merits, of an award of punitive damages, even though

the trial court has not done so." *Oberg* v. *Honda Motor Co.*, 322 Or. 544, 552 & n.9, 888 P.2d 8, 12 & n.9 (1995), *cert. denied*, 517 U.S. 1219 (1996);[14] see also *Blume* v. *Fred Meyer, Inc.*, 155 Or. App. 102, 114, 963 P.2d 700, 707 (1998) ("appellate court is in as good a position as trial court to apply legal standard to the evidence").

In *Honda*, however, this Court said exactly the opposite. It admonished that "review by the trial court . . . may be even more significant" than appellate review. 512 U.S. at 434 n.11. And several states and federal circuits reject the Oregon position. *Morgan* v. *Woessner*, 997 F.2d 1244, 1257 (9th Cir. 1993) (appellate court "must satisfy itself that the defendant was afforded the two prior stages of scrutiny"), *cert. dismissed sub nom. Searle* v. *Morgan*, 510 U.S. 1033 (1994); *Cole* v. *Control Data Corp.*, 947 F.2d 313, 320 (8th Cir. 1991) ("[w]e are concerned . . . whether the district court has appropriately reviewed the punitive damage award").[15]

Besides violating this Court's directive in *Honda*, the Oregon rule fails to recognize that meaningful trial-court review is not a mere formality. A trial judge has seen and heard the witnesses and, if the correct standards are applied, brings to the review a differently informed assess-

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[14] The subsequent petition for certiorari in *Honda* did not raise this issue. See Petition for Certiorari, No. 94-1890, OT 1994 (May 17, 1995), at i.

[15] *Accord*, *Sprague* v. *Walter*, 441 Pa. Super. 1, 78, 656 A.2d 890, 929 (1995), *appeal denied*, 543 Pa. 695 and 730, 670 A.2d 142 and 673 A.2d 336 (1996); *Coffey* v. *Fayette Tubular Prods.*, 929 S.W.2d 326, 328 (Tenn. 1996); *Alkire* v. *First Nat'l Bank*, 197 W. Va. 122, 130-31, 475 S.E.2d 122, 130-31 (1996). See also *Fleming* v. *Imperial Corp.*, 42 Cal. Rptr. 2d 124, 129 (Cal. App. 1995) ("we do not believe our review, standing alone, provides the 'meaningful and adequate review' . . . envisioned by *Oberg*"), *review dismissed*, 50 Cal. Rptr. 2d 74 (Cal. 1996) (not officially pub.).

ment than an appellate court reading a record. Trial judges are in a unique position to sense an atmosphere of "passion or prejudice" that is a classic breeding ground of excessive punitive awards.[16]

2. By no stretch could it be concluded that the trial court's review of punitive damages here was either "meaningful" or "adequate." The trial court never articulated what standards it was applying, and offered no reasoning at all; it simply thanked the counsel for their submissions, said it had "given considerable thought" to them, and then signed a boilerplate order adopting the jury's awards in every respect. See p. 5, *supra*.

The Oregon court believed that this Court requires no more. A. 34a-35a, citing *TXO Production Corp.* v. *Alliance Resources Corp.*, 509 U.S. 443, 465 (1993) (opinion of Stevens, J.). But the plurality opinion the Court of Appeals relied on had pointed out that the trial judge in that case had orally explained his agreement with the jury's appraisal of the conduct. 509 U.S. at 464-65. Nor was that the last word. Subsequently, in *Honda Motor Co.* v. *Oberg*, *supra*, this Court reiterated that "review *by the trial court*" must be "meaningful" and "adequate." 512 U.S. at 420 (emphasis supplied), quoting *Haslip*, 499 U.S. at 20; see also *BMW*, *supra*, 517 U.S. at 593 (Breyer, J., concurring) ("courts properly tend to judge the rationality of judicial actions in terms of the reasons that were given"). Here, what standard

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[16] See *Crookston* v. *Fire Ins. Exchange*, 817 P.2d 789, 804 (Utah 1991); *Teitel* v. *First Los Angeles Bank*, 231 Cal. App. 3d 1593, 1606, 282 Cal. Rptr. 916, 923 (1991), *review denied*, 1991 Cal. Lexis 4583 (1991); *Gollihue* v. *Consolidated Rail Corp.*, 120 Ohio App. 3d 378, 402, 697 N.E.2d 1109, 1125, *appeal denied*, 80 Ohio St. 3d 1444, 686 N.E.2d 273 (1997); Harkin, *BMW of North America, Inc. v. Gore: A Trial Judge's Guide to Jury Instructions and Judicial Review of Punitive Damage Awards*, 60 MONT. L. REV. 367, 394-95 (1999).

of review the trial judge applied, and how he applied it, remain a mystery.

This Oregon decision in this respect also contradicts holdings of at least two federal circuits and three state supreme courts, some of which hold that due process requires not just a statement of reasons, but even the entry of formal findings. See *American Employers Ins. Co.* v. *Southern Seeding Services, Inc.*, 931 F.2d 1453, 1458 (11th Cir. 1991); *Robertson Oil Co.* v. *Phillips Petroleum Co.*, 930 F.2d 1342, 1347 (8th Cir. 1991); *Coffey* v. *Fayette Tubular Prods.*, 929 S.W.2d 326, 328 (Tenn. 1996) ("[t]he judge shall clearly set forth the reasons . . . in findings of fact and conclusions of law demonstrating a consideration of all factors"); *Garnes* v. *Fleming Landfill, Inc.*, 186 W. Va. 656, 667, 413 S.E.2d 897, 908 (1991) ("the review given the award . . . by the trial court" was "neither meaningful nor adequate under the standards established in *Haslip*"); *Gamble* v. *Stevenson*, 305 S.C. 104, 112, 406 S.E.2d 350, 354 (1991) (trial court must specifically consider all *Haslip* factors and "set forth its findings on the record").

III. THE ISSUES ARE TIMELY AND IMPORTANT.

The growing phenomenon of States using the civil litigation process to impose punishment and extract substantial revenues for themselves is exactly the ancient practice that animated the Excessive Fines Clause. At least six states in addition to Oregon now have statutes which exact a share of punitive damages awarded in suits between private parties.[17]

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[17] Ga. Code Ann. § 51-12-5.1(e)(2) (75% to State minus proportionate part of costs and attorneys' fees); 735 Ill. Comp. Stat. § 5/2-1207 (trial court may apportion award in its discretion); Ind. Code § 34-51-3-6(b) (State receives 75% of gross amount); Iowa Code § 688A.1(2)(b) (State receives 75% of net amount after fees); Mo. Stat. § 537.675(2) (State receives 50% of net amount); Utah

Such legislation is not necessarily unwise. It lessens windfalls to plaintiffs, and has even been urged in judicial opinions. See *Farmers Ins. Exchange* v. *Shirley*, 958 P.2d 1040, 1054 (Wyo. 1998) (Thomas, J., concurring) ("For myself, I would favor the legislative adoption of an approach that would allocate punitive damages to the state coffers"); *id.* at 1058 (Lehman, J., dissenting) ("I would . . . urge our legislature to consider a statutory enactment which would allocate a percentage of a punitive damage award to the plaintiff, with the remainder to be directed to the state"); *General Resources Organization, Inc.* v. *Deadman*, 932 S.W.2d 485, 486 (Tex. 1996) (Gonzalez, J., concurring) ("A preferable alternative is for Texas to join the growing list of states that have enacted laws allocating a portion of punitive damage awards to the State"); see also *Smith* v. *Wade*, 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting) ("Even assuming that a punitive 'fine' should be imposed after a civil trial, the penalty should go to the State, not to the plaintiff—who by hypothesis is fully compensated"). Some judges have urged that payment of punitive damages to the State be ordered even without a statute. See *Hilgedick* v. *Koehring Finance Corp.*, 8 Cal. Rptr. 2d 76, 98, 99 (Cal. App. 1992) (Peterson, J., concurring) ("the common law concept of punitive damages should be judicially evolved" to require payment of a portion "to the general fund of the State of California"), *review dismissed*, 1993 Cal. Lexis 3748 (1993) (not officially pub.).[18]

Code Ann. § 78-18-1(3) (State receives 50% of award above $20,000 net after fees).

[18] Alabama at one time judicially adopted such a requirement, but it later was rescinded by the court and forbidden by the legislature. *Compare Life Ins. Co.* v. *Johnson*, 684 So. 2d 685, 698 (Ala. 1996), *vacated*, 519 U.S. 923 (1996), *with Life Ins. Co.* v. *Johnson*, 701 So. 2d 524, 532 (Ala. 1997), *and* Ala. Code § 6-11-21(*l*).

But advocates of States' sharing in punitive damages have acknowledged that "[t]he state should be aware, however, that if it establishes itself as the beneficiary of the award, it may subject the punitive damage awards to constitutional scrutiny under the 'excessive fines' clause of the Eighth Amendment." Breslo, *Taking the Punitive Damage Windfall Away From the Plaintiff: An Analysis,* 86 N.W.U.L. REV. 1130, 1139 (1992); *accord, e.g.,* Kirgis, *The Constitutionality of State Allocation of Punitive Damages Awards,* 50 WASH. & LEE L. REV. 843, 873 (1993) ("State allocation will then face the constitutional proscriptions embodied in the Excessive Fines Clause"); Note, 106 HARV. L. REV. 1691, 1695 (1993) ("all split-recovery statutes are penal in nature and thus implicate the Eighth Amendment"); Note, 80 CORNELL L. REV. 104, 140 (1994) ("punitive damage awards in a split-recovery regime are subject to the limitations of the excessive fines clause") (capitalization omitted).

The commentators also have noted the need for this Court to rule on the Eighth Amendment issue:

> "[G]overnment collection of punitive damages awards in civil suits might subject the awards to limitations imposed by the Excessive Fines Clause. Although the Supreme Court in *Browning-Ferris* declined to decide the issue whether such awards implicate Excessive Fines protections, the Court will likely address the question in the future."

Note, *Developments in the Law—The Civil Jury,* 110 HARV. L. REV. 1408, 1535 (1997) (footnotes omitted). With such statutes now common, and decisions like this one creating uncertainty, that question should be settled.

CONCLUSION

For the reasons stated, certiorari should be granted.

Respectfully submitted,

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November 4, 1999

APPENDIX

APPENDIX A

IN THE SUPREME COURT
OF THE STATE OF OREGON

SC S46478
CA A97249

DOUGLAS J. AXEN and SANDRA AXEN,
Plaintiffs-Respondents,
Respondents on Review,

v.

AMERICAN HOME PRODUCTS CORPORATION
through its pharmaceutical division,
Wyeth-Ayerst Laboratories,
Defendant-Appellant,
Petitioner on Review,

STATE OF OREGON, and WAL-MART STORES, INC.,
Defendants.

Multnomah County Circuit Court No. 9509-06363

ORDER DENYING REVIEW

The Court has considered the petition for review and ORDERS that it be denied.

Dated this 28th day of September 1999.

/s/ Wallace P. Carson Jr.
WALLACE P. CARSON JR.
CHIEF JUSTICE

c: Jeffrey B. Wihtol
J P Graff
Karen O'Kasey
John W. Vanderman
John G. Kester
Robert J. Shaughnessy

APPENDIX B

FILED: February 10, 1999

IN THE COURT OF APPEALS
OF THE STATE OF OREGON

DOUGLAS J. AXEN and SANDRA AXEN,
Respondents,

v.

AMERICAN HOME PRODUCTS CORPORATION
through its pharmaceutical division,
Wyeth-Ayerst Laboratories,
Appellant,

STATE OF OREGON and WAL-MART STORES, INC.,
Defendants.

(9509-06363; CA A97249)

Appeal from Circuit Court, Multnomah County.

Robert P. Jones, Judge.

Argued and submitted October 22, 1998.

John G. Kester, appearing *pro hac vice,* argued the cause for appellant. With him on the briefs were John W. Vardaman, Robert J. Shaughnessy and Helen I. Dooley of Williams & Connolly, Washington, D.C., and Karen O'Kasey, Margaret Hoffmann and Schwabe, Williamson & Wyatt, P.C.

John Paul Graff argued the cause for respondents Douglas J. Axen and Sandra Axen. With him on the brief were Jeffrey B. Wihtol and Graff & O'Neil.

Before Warren, Pesiding Judge, and Edmonds and Armstrong, Judges.

ARMSTRONG, J.

Reversed as to Sandra Axen's claim for economic damages for loss of consortium; otherwise affirmed.

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Appellant against respondent Sandra Axen; respondent Douglas Axen against appellant.

[ ] No costs allowed.

[x] Costs allowed, payable by: Respondent Sandra Axen in favor of appellant; appellant in favor of respondent Douglas Axen.

[ ] Costs allowed, to abide the outcome on remand, payable by:

ARMSTRONG, J.

Defendant American Home Products Corporation (AHP)[1] appeals from a judgment holding it liable for damages suffered by Douglas Axen. A jury awarded

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[1] Plaintiffs' original complaint named as defendants AHP, through its pharmaceutical division Wyeth-Ayerst Laboratories, the State of Oregon and Wal-Mart Stores, Inc. The state and Wal-Mart were later dismissed as defendants.

Plaintiffs filed a cross-appeal challenging the State of Oregon's claim to a portion of the punitive damage award. Plaintiffs and the state thereafter filed a joint motion to dismiss the cross-appeal for want of jurisdiction, and we granted the motion.

Axen $407,265.75 in economic damages and $1.5 million in noneconomic damages. The jury also awarded Axen's wife, Sandra Axen, $936,392 in damages for loss of consortium. In addition to the compensatory damages, the jury awarded Douglas Axen $20 million in punitive damages.

Because the jury returned a verdict in plaintiffs' favor, we view the evidence and all inferences that reasonably may be drawn from it in the light most favorable to plaintiffs. *Greist v. Phillips*, 322 Or 281, 285, 906 P2d 789 (1995). In 1994, Douglas Axen was diagnosed as having a heart condition for which his doctor prescribed amiodarone, a drug manufactured and distributed by AHP under the trade-name "Cordarone." The federal Food and Drug Administration (FDA) had approved amiodarone for medical use in 1985, at which time AHP began marketing Cordarone. Beginning in 1986, medical studies were published that linked amiodarone with vision loss and optic neuropathy. AHP was aware of those studies. In August 1994, when Axen began taking Cordarone, the package insert listed "optic neuritis," or optic nerve inflammation, as a rare adverse reaction occurring in fewer than one percent of the patient population, but it did not mention optic neuropathy. Neither the package insert nor any of AHP's promotional material listed permanent vision loss as a possible side effect of amiodarone use, nor did any of AHP's materials recommend regular opthamological examinations while using amiodarone.

At some time in September 1994, Axen began to notice changes in his vision. The changes became more noticeable in late October 1994, and he complained of them to his cardiologist. His cardiologist referred him to an opthamologist [*sic*], who examined his eyes and discovered optic nerve swelling and hemorraghing [*sic*] in each eye.

The opthamologist [*sic*] believed that the eye conditions were caused by amiodarone. On November 7, 1994. Axen's cardiologist called Axen and recommended that he stop taking the drug. Although Axen stopped using Cordarone,[2] his vision continued to deteriorate to the point that he became legally blind. Axen eventually was diagnosed as suffering from amiodarone-induced toxic optic neuropathy, which resulted in irreversible degeneration and atrophy of the optic nerve in each eye.

Axen brought this action, claiming, *inter alia*, that AHP had failed to warn that its product could cause permanent vision loss and that that failure to warn was intentional and was done with reckless disregard for the health and well-being of the people using the drug. Sandra Axen joined in the action, claiming economic and noneconomic damages for loss of consortium. The case was tried to a jury, which awarded the Axens a total of $22,843,657.75 in compensatory and punitive damages.[3] AHP appeals from the judgment based on that verdict, claiming that the trial court erred when it (1) allowed admission of overly prejudicial evidence of uncharged misconduct; (2) denied AHP's motion for a directed verdict on plaintiffs' claim that AHP had been negligent in failing to report certain medical studies to the FDA; (3) failed to apply

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[2] It is not entirely clear from the record exactly when Axen began to complain of problems with his vision and exactly when he stopped taking Cordarone. However, there is sufficient evidence to support a finding that his vision problems began after he began taking Cordarone.

[3] AHP moved to bifurcate the trial, separating the liability and punitive phases of it. The court denied the motion but bifurcated the jury deliberations. The jury was instructed not to consider punitive damages during its deliberations about liability, and certain exhibits were withheld from the jury until it had determined liability. AHP has not assigned the trial court's refusal to bifurcate the trial as error.

the damages cap required by ORS 18.560;[4] (4) held that Sandra Axen could seek damages for lost earnings as part of her claim for loss of consortium; (5) failed to grant AHP's motion for a preemptory instruction on punitive damages; (6) allowed a punitive damage award in a proceeding that failed to comply with due process; and (7) approved a punitive damage award that was unconstitutionally excessive. We affirm in part and reverse in part.

In its first assignment of error, AHP contends that the trial court erred by admitting as evidence two letters from the FDA to AHP and a press release from United States Senator Edward M. Kennedy. The letters and the press release all referred to AHP's marketing of Cordarone and took AHP to task for over-promoting its product.

The FDA letters were admitted for the limited purpose of proving punitive damages. The first letter from the FDA to AHP was dated December 15, 1989. The version submitted to the jury was redacted pursuant to AHP's request and reads, in pertinent part:

> "Dear Dr. Canavan: [5]
>
> "Please refer also to your current promotional campaign for Cordarone (amiodarone HCl).
>
> "These promotional campaigns by your firm have presented and continue to present false and/or misleading information regarding the safety and/or effi-

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[4] AHP concedes that the assignment of error as to the statutory damage cap is controlled by our decision in *Lakin v. Senco Prods., Inc.*, 144 Or App 52, 925 P2d 107 (1996), *rev allowed* 325 Or 438 (1997), and asserts it here only for the purposes of preserving it for Supreme Court review. Accordingly, we do not address it in our decision.

[5] In 1989, Dr. Bernard Canavan was chairman of the board of Wyeth-Ayerst Laboratories. *See* note 1 above.

cacy of these products, thereby resulting in misbranding of these products under the Federal Food, Drug and Cosmetic Act.

"Cordarone (amiodarone HCl)

"Cordarone is indicated only for treatment of documented, life-threatening recurrent ventricular arrhythmias (recurrent ventricular fibrillation, recurrent hemodynamically unstable ventricular tachycardia) when these conditions have not responded to documented adequate doses of other available antiarrhythmics or when alternative agents cannot be tolerated. Cordarone is clearly labeled as an antiarrhythmic of last resort.

"The Indications section also makes clear that Cordarone should be administered only by physicians who are expert in the treatment of recurrent life-threatening arrhythmias. The labeling contains an extensive boxed warning that cautions against the use of the drug because of the extreme risks associated with its use. This extraordinarily cautious labeling accurately reflects the opinion of the medical community that Cordarone is an antiarrhythmic of last resort.

"Prior Warnings Regarding Cordarone Promotion

"Your firm has been warned repeatedly against promoting the drug in a manner inconsistent with this cautionary labeling, with the most recent instance being an extensive telephone discussion between DDAL and two representatives of your firm on February 17, 1989. In that conversation, DDAL advised your firm that the content and emphasis of then-current journal advertisements for Cordarone were fundamentally inconsistent with the content and emphasis of the approved labeling for this product.

"Your representatives suggested that prescribers are already aware of hazards associated with the use of Cordarone, thereby minimizing the need for maintaining this cautionary tone in your promotional activities. DDAL emphasized that certain prescribers may not be familiar with these hazards, and other prescribers might infer from your advertising that Cordarone has been demonstrated to be safer than originally believed. As you know, the labeling for Cordarone has not undergone substantive change since approval, and the agency's original concerns regarding safety of Cordarone have been substantiated.

"Current Promotional Activities

"Review of a current advertisement for Cordarone (3441-3, published in an October, 1989 journal) indicates that our cautions have been ignored by your firm. The advertisement is clearly intended to minimize the hazards of the drug and emphasize the drug's efficacy. Ad number 3441-3 is listed as having been last revised on January 2, 1987.

"This follows your use of brochure number CDR152 (submitted by your firm on May 25, 1989) in which you also minimize hazards associated with the administration of Cordarone, by suggesting that it is possible to administer the drug in a manner that eliminates the need for concern over these hazards.

"Moreover, the primary efficacy claim in this piece is an unapproved use of Cordarone. Your statement that 'an early decision for Cordarone * * * can improve the odds' clearly fails to recognize the drug's unique role as a drug of last resort.

"In brochure number CDR172 (submitted by your firm on August 23, 1989), a single case study is pre-

sented which suggests that Cordarone is readily tolerable. At no point in the piece is Cordarone described as a drug of last resort.

"Your firm's ongoing false and misleading promotional activities for Cordarone cause it to be misbranded under sections 502(a), 502(f), 502(n) and 201(n) of the Federal Food, Drug and Cosmetic Act.

"Conclusion

"Your firm has an intolerable record of compliance with the law, compounded by your recent promotion of Cordarone. * * * Your firm continues to promote Cordarone, an extraordinarily hazardous drug, in a manner we consider clearly misrepresentative of its known hazards.

"We intend to ensure, by all available regulatory means, that your firm complies with the law, and with the widely-accepted scientific principles incorporated therein, so that health care providers and their patients can benefit from promotional information that will further, rather than thwart, their efforts to make informed product selection decisions."

The FDA letter then listed a number of actions that the agency required AHP to take in order to alleviate the perceived defects in its promotional materials and stated that, if AHP failed to provide a satisfactory response, the agency was "prepared to recommend legal action, which may include seizure, injunction, and/or criminal prosecution."

The second FDA letter was received by AHP on February 14, 1992, and reads:

"Dear Mr. Victoria: [6]

"This is in reference to several promotional labeling pieces for Cordarone (amiodarone HCl) identified as CDR:204, CDR:205, and CDR:208 (the 'Risks and Benefits' brochures/pieces); CDR:212 (the 'Clinical Features of Amiodarone-Induced Pulmonary Toxicity' detailer); and CDR:210 (the 'Unmistakably Cordarone: New Tablet-Same Product' slimjim).

"We regard these pieces to be false and/or misleading within the meaning of § 502(a) of the Federal Food, Drug and Cosmetic Act in that they present an unbalanced view of Cordarone's benefits as opposed to its risks. Our specific concerns are outlined below:

"1. *'Unprecedented antiarrhythmic efficacy:' 'The most effective antiarrhythmic you can prescribe:' 'Unparalleled efficacy.':* These phrases are completely unsubstantiated and thus should not be used. Many of the pieces show bar graphs indicating investigators and the percent 'efficacy' they determined using Cordarone. However, charts such as these are meaningless and misleading unless some time frame is included. Were these patients free of serious arrhythmias for 4 weeks or 2 years? Given that sudden death recurs in 30% of patients after one year (your cited data), 'efficacy' rates of 61% are certainly not 'unparalleled' or 'unprecedented.'

"Moreover, these pieces may mislead a prescriber into considering using Cordarone earlier

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[6] At the time of the letter, Justin Victoria was an assistant vice president for regulatory affairs at Wyeth-Ayerst Laboratories. *See* **note 1** above.

than its indicated use as a drug of last resort. The presentations in the brochures that present the risks and benefits of 'sudden death' point the reader to the misleading conclusion 'sudden death = use Cordarone.' Lastly, this statement should always be prominently highlighted on *all* of your promotional pieces: ' * * * there is no evidence from controlled trials that the use of Cordarone affects survival.'

"2. *The 'Risks and Benefit' presentation:* This entire presentation from brochures CDR:204 and CDR:205 is misleading. Your 'hemodynamic' panels are used as an example. The 'risk' side of the panel usually lists negative consequences. Thus the 'Hemodynamic risk of drug therapy' lists 'exacerbating underlying heart failure * * * decreasing electrical conduction * * * decreasing automaticity * * * provoking AV block' all set against a background of an ECG strip with a ventricular arrhythmia (V-tach). The opposite panel gives the 'Benefit(s) of a unique pharmacological profile.' Listed are: (1) a 'low incidence of CHF aggravation' (Low compared to what? A percent would be much more meaningful); (2) the Cordarone logo at the bottom; (3) but nothing addressing the previously stated risks of AV block, decreased conduction and automaticity (are these truly hemodynamic?). Is the reader to assume by omission that Cordarone has no AV block or conduction risks as do those other antiarrhythmics? AV block (*e.g.*) is clearly mentioned as an adverse reaction in Cordarone's labeling. This presentation is easily misleading.

"3. *'Low proarrhythmic potential':* Once again, low compared to what? Your detailer should *clearly* and *obviously* state that the risk is 2-5%. A chart (CDR:204) showing the 'risk of proarrhythmia' with other antiarrhythmic agents excludes amiodarone and quotes 6% as the lowest proarrhythmic incidence rate. Aside from the obvious scientific inaccuracy of comparing incidence data from different trials, is the reader to assume that Cordarone has the lowest proarrhythmic incidence since its 2-5% rate is less than the 6-19% rate for those other antiarrhythmics? I remind you of your labeling (WARNINGS section): * * * Like other antiarrhythmics, Cordarone can exacerbate the arrhythmia * * * this has occurred in 2 to 5% of patients in various series, and significant heart block or sinus bradycardia has been seen in 2 to 5% * * * Although the frequency of such proarrhythmic events *does not appear greater with Cordarone than with many other agents used in this population, the effects are prolonged when they occur.'* These false and misleading comparisons to other antiarrhythmics should be omitted.

"4. *'Decreased dosage may decrease the incidence of pulmonary toxicity' (use of the Dusman study):* The following comments have been specifically discussed with the FDA's Division of Cardio-Renal Drug Products. The quoting and circulation of the Dusman Study (*Dusman RE, Stanton MS, Miles WM et al. Clinical features of amiodarone-induced pulmonary toxicity.* Circulation. *1990; 82: 51-59*) is a violation of the Act since this data (*sic*) is as yet unconfirmed.

There does not appear to be any substantive recent data regarding pulmonary toxicity. Although there has been speculation within the scientific community that a lower dose may cause less pulmonary toxicity, a 1989 workshop sponsored by your firm failed to reach agreement that pulmonary toxicity is either dose or duration-related. Regardless, no specific concrete information on the dose-relationship to pulmonary toxicity is included in your labeling. Your promotion of this unproven data [*sic*] is in violation of the Act, and all references to the Dusman study should be deleted.

"5. *Selected listing of side effects:* In the back of the 'Risks and Benefits' pieces is a listing of 'Selected adverse reactions.' Included are serious side effects such as 'pulmonary toxicity * * * 2% to 7%; Liver function abnormalities * * * 4% to 9%; proarrhythmia * * * 2% to 5%; hypotheroidism * * * about 2%.' The 'Risks and Benefits' detailer has tabbed sections on 'efficacy,' 'proarrhythmia,' 'hemodynamics,' and 'pulmonary toxicity.' However, the discussion of other serious reactions is relegated to the end of the detailers (in a section without tabs). These adverse reactions are one of the main reasons Cordarone is to be used only as an agent of last resort. It is misleading to provide information on these reactions in an inconspicuous location.

"Additionally, Cordarone has many not-usually-serious yet very bothersome adverse reactions that you do not address but should communicate to the prescriber. These include (quoting from the labeling): 'neurologic problems are extremely common, occurring in 20 to 40% of

> patients and including malaise and fatigue, tremor and involuntary movement, poor coordination and gait, and peripheral neuropathy . . . Gastrointestinal complaints, and anorexia, occur in about 25% of patients . . . Asymptomatic corneal microdeposits are present in virtually all adult patients who have been on the drug more than six months . . . Dermatological adverse reactions occur in about 15% of patients, with photosensitivity being most common (about 10%).'
>
> "These objections are equally applicable to all other promotional materials featuring these claims.
>
> "Your written response within fifteen (15) working days of receipt of this letter should indicate your firm's intentions with respect to the above observed violations. We request that use of these pieces and other similar or related materials be discontinued immediately."

(Emphasis in original.)

The Kennedy press release was issued on December 12, 1990, and was offered as evidence of liability.[7] The press

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[7] Plaintiffs offered the Kennedy press release and two industry newsletters as evidence "establishing notice to the defendant of what defendant knew or should have known at that time about public concerns and government concerns about its compliance with law with respect to the promotion and sale and labeling of its product amiodarone." AHP responded that it understood that those "documents are not limited to punitive damages." The court then informed the jury that the documents were being admitted for the limited purpose of notice but that it was "not a punitive-damage situation." Although the parties and the court later assumed that the press release had been admitted solely as evidence on punitive damages, it was clearly offered and received as evidence of liability. It appears, however, that the jury was not given the press release or the industry publications to examine until it began to deliberate on punitive damages.

release contained the text of Senator Kennedy's statement at a hearing before the Senate Labor and Human Resources Committee on the advertising, marketing and promotional practices of the pharmaceutical industry. Senator Kennedy had the following to say about AHP:

> "Yesterday the committee heard compelling testimony from a number of witnesses who were critical of a variety of pharmaceutical marketing practices. Some of these practices, such as gifts and symposia, have plagued the relationship between the pharmaceutical industry and the medical profession for many years. Others, such as video news releases, celebrity endorsements, spurious marketing studies and the Physician Computer Network are more recent and more sophisticated.
>
> "We invited Abbott, CIBA-GEIGY, Wyeth-Ayerst and Hoffman-LaRoche to appear at today's hearing to respond to these allegations, but all four companies declined to appear.
>
> "* * * * * *
>
> "Wyeth-Ayerst has a responsibility to explain its Inderal 'frequent flyer' program, its poor record of compliance with FDA's rules on promotion, and its flagrantly abusive campaign for Cordarone. This highly toxic drug is for severe arrhythmias, and is approved only as a drug of last resort for a small number of seriously ill patients. But that means small profits too. So the company expanded its market beyond the approved indications for the drug. It distributed information about how well Cordarone was tolerated based on one individual case history in the company files. It distributed brochures advising doctors to 'make an early decision for Cordarone'—a highly unusual promotional message for a drug of

> last resort. The FDA issued a warning letter. But the company continued to detail the drug, even to non-specialists, who would have no understanding of the appropriate treatments for the life-threatening condition for which the drug was approved. The company distributed over 16,000 golf balls with Cordarone stamped on them. The company's goal was clearly to promote the drug's use for a large population of patients that could generate higher revenues, to push a product beyond the limits of its scientific data, even if the company is putting patients at risk."

AHP contends that the letters and press release were evidence of uncharged misconduct subject to OEC 404(3)[8] and were inadmissible because their probative value was outweighed by their prejudicial effect.

As a preliminary issue, we address plaintiffs' contention that AHP failed to preserve its 404(3) objection to the admission of the press release. At the beginning of the trial, AHP submitted a list of objections to plaintiffs' exhibits. Referring to exhibit 69, the press release, AHP objected solely on the ground that it contained hearsay. When the press release was introduced at trial, AHP again objected on the ground that it was hearsay. At no time before or during trial did AHP *specifically* ask that the press release be excluded under OEC 404(3).[9] On ap-

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[8] OEC 404(3) provides:

> "Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

[9] At one point in the trial, plaintiffs asked an expert witness whether he was aware that the FDA "had made a finding that

peal, AHP claims that it did not need to make a separate 404(3) objection to the press release, because the press release dealt with much the same subject matter as the FDA letters and the court had already ruled that those letters would be admitted for limited purposes. AHP argues that "having received an unambiguous adverse ruling[, it] was not required to engage in the futility of rearguing the same objections when the press release * * * was offered." That contention is not well-taken. Certainly, having received an unambiguous adverse ruling as to the letters, AHP was not required to relitigate its objection *to the letters* in order to preserve its right to challenge that ruling on appeal. *See State v. Cole*, 323 Or 30, 35, 912 P2d 907 (1996) ("Once an evidentiary ruling is made pretrial, the lack of later relitigation of the same issue * * * does not render any claim of error associated with the ruling unpreserved."). That did not relieve AHP of the obligation to object to *other* evidence, even though that evidence may indeed address the same subject matter as the letters. AHP complains on appeal of the "massively prejudicial" effect of the press release, yet it failed to complain properly of such massive preju-

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Wyeth and [AHP] were falsely and with misleading statements overpromoting amiodarone in the United States[.]" AHP objected, stating "[o]bjection * * * for the same reasons we discussed in chambers." Plaintiffs then asked the witness if he was aware of Senate hearings at which AHP had been accused of overpromoting amiodarone. AHP stated "[s]ame objection, Your Honor, and I'd like to request a limiting instruction." The court then advised the jury that the "last two questions asked, deal with this question of a limited use for punitive damages only, and not for the basic question of liability." Even if that exchange involved a 404(3) objection to evidence about the Kennedy press release, it did not preserve the issue for our review. The press release had earlier been admitted over what was solely a hearsay objection, *see* note 7 *supra*, so any error in overruling a later 404(3) objection to that evidence is necessarily harmless in the absence of a motion to strike the exhibit from the record on 404(3) grounds, which was not made.

dice at trial. Because AHP did not raise a proper 404(3) objection to the press release at trial, we will not consider such an objection for the first time on appeal. *See Vancil v. Poulson*, 236 Or 314, 320-21, 388 P2d 444 (1964) ("Appellate courts should not decide new issues upon which the trial court had no opportunity to rule.").

As for the letters from the FDA to AHP regarding the over promotion of Cordarone, we need not determine whether the trial court erred in admitting them because any error is harmless in light of the other properly admitted evidence. The letters from the FDA, one written in 1989 and the other in 1992, accused AHP of "promot[ing] Cordarone, an extraordinarily hazardous drug, in a manner * * * clearly misrepresentative of its known hazards" and "present[ing] an unbalanced view of Cordarone's benefits as opposed to risks." Plaintiffs offered the letters as part of the case for punitive damages, arguing that they were evidence of federal concern about a continuing course of conduct of over promotion and disregard for consumer safety by AHP. The information contained in the letters was repeated in two pharmaceutical trade publications offered by plaintiffs as evidence that AHP was on notice that its promotion of Cordarone was under scrutiny.[10] Those publications, like the press release, were admitted for purposes of determining AHP's liability for failure to warn. Plaintiffs offered the industry publications as evidence that AHP was on notice that the FDA disapproved of its marketing of Cordarone. Although AHP initially objected to the admission of the industry publications at trial, it has not reasserted that ob-

[10] The trade publications, as well as most of the exhibits that were discussed, submitted and admitted as evidence, apparently were returned to the parties and, hence, are not part of the record on appeal. We rely on the descriptions of those publications as discussed by the parties and the witnesses in the course of trial argument and testimony.

jection here. The FDA letters were not offered as evidence of liability, but AHP complains that the jury could not have helped but consider those letters during its deliberations about liability. Because the industry publications and the press release contained much the same type of information as the letters and were offered as evidence of liability, any consideration that the jury would have given the FDA letters would have been merely cumulative. Evidence that is merely cumulative does not affect a substantial right and is not a proper ground for reversal. *See Powers v. Cheeley*, 307 Or 585, 597, 771 P2d 628 (1989) ("other evidence of like effect diminishes any argument that a substantial right was affected by the [erroneously admitted evidence]").

In its second assignment of error, AHP contends that the trial court erred when it allowed plaintiffs to amend their complaint to allege that AHP was negligent in failing to abide by federal regulations that required it to report certain scientific literature to the FDA and when it denied AHP's motion to strike that allegation.[11] AHP argues that the regulations requiring such reporting do not create a private cause of action and that there is no evidence that Douglas Axen's loss of vision was caused by AHP's failure to report. AHP further argues that this issue is controlled by our decision in *Waddill v. Anchor Hocking, Inc.*, 149 Or App 464, 944 P2d 957 (1997), *rev allowed* 328 Or 40 (1998). We disagree.

At the close of the evidence, plaintiffs moved to amend the pleadings to add, as a further specification of negli-

[11] AHP moved for a directed verdict on that specification of negligence, but the proper motion was to strike it. *See, e.g., NW Pac. Indem. v. Junction City Water Dist.*, 296 Or 365, 372 n 1, 677 P2d 671 (1984); *Dept. of Transportation v. DuPree*, 154 Or App 181, 183 n 2, 961 P2d 232, *rev den* 327 Or 621 (1998). Because no one was misled by the improper terminology, we treat AHP's motion as a motion to strike and use that term in our opinion.

gence, AHP's failure "to report medical and scientific literature on the association between amiodarone use and loss of vision to the United States Food and Drug Administration." AHP objected, claiming that (1) the regulations did not create a private cause of action; (2) there was no evidence that AHP had violated the regulation; and (3) there was no causal link between any alleged failure to report that literature and Douglas Axen's injuries. The trial court granted the motion to amend and instructed the jury that, if AHP had failed to abide by the regulations, that failure would constitute negligence, unless the jury determined that AHP had acted reasonably under the circumstances.

We conclude that the trial court's rulings correctly embodied the principles set forth in *Gattman v. Favro*, 306 Or 11, 15 n.3, 757 P2d 402 (1988), on the use of governmental rules to establish a standard of care in a negligence action. In that case, the court explained:

> "Strictly speaking, the doctrine of 'negligence *per se*' does not create a cause of action. *Rather, it refers to a standard of care that a law imposes within a cause of action for negligence.* As [the court] stated in *Shahtout v. Emco Garbage Co.*, 298 Or 598, 601, 695 P2d 897 (1985):
>
> > " 'When a plaintiff (or a defendant seeking to prove negligence on plaintiff's part) invokes a governmental rule in support of that theory, *the question is whether the rule, though it was not itself meant to create a civil claim, nevertheless so fixes the legal standard of conduct that there is no question of due care left for a fact-finder to determine*; in other words, that noncompliance with the rule is negligence as a matter of law. This court long has held that violations of statutory safety rules by themselves

> provide the element of negligence with respect to those risks that the rules are meant to prevent, at least unless the violator shows that his conduct in fact did not violate the rule under the circumstances. *Barnum v. Williams*, 264 Or 71, 504 P2d 122 (1972); *Peterson v. Standard Oil Co.*, 55 Or 511, 106 P 337 (1910).' (Footnote omitted)."

(Emphasis added.) In other words, evidence that AHP had violated the regulations would be evidence that AHP had breached a standard of care established by those regulations. If that breach could be shown to have caused Douglas Axen's injuries, then AHP could be liable under a common-law theory of negligence. Thus, AHP's arguments that the regulations do not provide a cause of action are irrelevant, as are its arguments that plaintiffs did not preserve a statutory negligence claim. *Waddill* is inapplicable, because, in that case, the defendant was not under any regulatory or statutory duty to act that could have affected the plaintiff.

Pursuant to 21 CFR sections 324.80 and 314.81, successful applicants for FDA approval to market a new drug are required to make certain reports to the FDA.[12] Under 21 CFR sections 314.80(b) and 314.80(c), AHP was required to review reports in the scientific literature, as well as unpublished scientific papers, for references to adverse drug experiences involving Cordarone and to notify the FDA of those reports. If the adverse experience was serious or unexpected, AHP was required to submit the report to the FDA no later than 15 days after AHP's receipt of the information. 21 CFR § 314.80 (c)(1)(I). A "serious adverse drug experience" includes, among others, "a persistent or significant disabil-

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[12] AHP does not contend that the FDA regulations do not apply to it.

ity." 21 CFR § 314.80(a). An "unexpected adverse drug experience" is an adverse experience not currently listed on the product labeling *or* an adverse experience that may be symptomatically or pathophysiologically related to an event listed in the labeling but of greater severity or specificity. 21 CFR § 314.80(a). We conclude that, under those definitions, post-marketing reports of blindness brought about by amiodarone-induced toxic optic neuropathy would be both serious and unexpected and, therefore, would fall under the reporting requirements of 21 CFR section 314.80. Under 21 CFR section 314.81, AHP was required to submit to the FDA a comprehensive report each year within 60 days of the anniversary date of the approval of AHP's application to market Cordarone. The report was to include, among other published clinical trials of the drugs, or abstracts of those trials, conducted by or otherwise obtained by AHP.[13] [*Sic.*]

AHP argues that, even if it failed in its obligation to report articles, there is no causal link between that failure and Douglas Axen's injuries. Plaintiffs argue in response that there is sufficient circumstantial evidence to support

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[13] Plaintiffs identified two articles from the scientific literature that AHP did not submit to the FDA as required, referred to by the parties as "the Mayo Clinic article" and "the Mansour article." The Mayo Clinic article was published in 1987 and described optic neuropathy in a number of patients undergoing amiodarone treatment at the clinic. Eight of those patients suffered vision loss. Although AHP was aware of the Mayo Clinic article, there was no evidence that AHP ever forwarded that article to the FDA. The Mansour article, which was published in 1988, was a single case study in which the authors described the toxic effect of amiodarone on the patient's optic nerve. Because the patient lost his eye to cancer, the doctors were able to perform extensive histopathologic studies on it and to quantify the effect of amiodarone on the patient's optic nerve. There is no evidence that AHP submitted the Manour article to the FDA. AHP does not argue that it did, indeed, submit the two articles.

a jury finding that there was such a link. We agree with plaintiffs. Evidence was presented at trial that the Mayo Clinic article was the only article to document the association between amiodarone use and vision loss, based on an analysis of the case histories of a large number of patients by both cardiologists and neuro-opthamologists. Moreover, evidence was introduced to show that, when the Mayo Clinic article was submitted to the Canadian equivalent of the FDA, that agency required the Canadian distributor of Cordarone to change the product labeling in order to call more attention to the risk of vision loss. The new Canadian label also included a recommendation for regular opthamological examinations designed to detect damage to the optic nerve. Further evidence was submitted to show that the Mansour article was the only pathological study of a human optic nerve that had been subjected to amiodarone-induced toxicity. When viewed in the light most favorable to sustaining the jury's verdict, there is sufficient evidence from which the jury could have concluded that, had the FDA been given the articles, the FDA would have required AHP to change its product labeling, as the Canadian authorities had ordered AHP's Canadian counterpart to do.

Although Douglas Axen testified that he was not sure whether he would have refused Cordarone treatment if he had been warned of the danger of vision loss, he went on to state that, had he been so warned, he would have been much quicker to act when he began having problems with his eyes. A reasonable jury could have concluded that, had the FDA been notified of the Mayo Clinic and Mansour studies and had it required AHP to change its labeling, then Douglas Axen might have discontinued his use of amiodarone before its toxic effect robbed him of his vision. Accordingly, the trial court did not err in denying AHP's motion to strike on that specification of negligence.

In its forth assignment of error,[14] AHP argues that the trial court erred when it allowed the jury to consider Sandra Axen's lost income as part of her claim for loss of consortium.[15] In addition to $500,000 in noneconomic damages, Sandra Axen claimed $436,392 in economic damages resulting from her decision to take early retirement to care for her husband after his injury. Apart from lost income, Sandra Axen did not make any other claim for economic damages. AHP contends that lost income is not damage that is recoverable as part of a claim for loss of consortium. We agree.

> "Loss of consortium has traditionally been thought of in terms of spousal consortium and includes, in addition to material services, elements of companionship, felicity and sexual intercourse. These factors are deemed integral parts of a single conceptual unity, the interference with which is considered the basis for a derivative action by the uninjured spouse for the loss of its benefits."

Terrence F. Kiely, *Modern Tort Liability: Recovery in the '90s* § 8.10, at 407 (1990).

The Oregon Supreme Court has defined consortium as "the common-law right of a [spouse] to the companion-

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14 AHP's third claim of error addressed the damages cap in ORS 18.560. See note 4 above.

15 Plaintiffs argue that AHP did not preserve the issue of whether forgone earnings may be considered in a claim for loss of consortium. We disagree. When the trial court instructed the jury that it "may consider the amount of loss of income sustained by * * * Mrs. Axen, since the injury to her husband to date, [and] the impairment in future earning capacity that it is reasonably probable that Mrs. Axen will sustain in the future[,]" AHP objected "on the grounds that we raised in our summary judgment, AHP argued that the economic damages sought by Sandra Axen were not recoverable in a claim for loss of consortium. The economic damages sought by Sandra Axen were for loss of earnings, hence AHP has preserved the issue for appeal.

ship, love and services of the injured spouse," *Elling v. Blake-McFall Co.*, 85 Or 91, 95, 166 P 57 (1917), or "the right to the conjugal fellowship of the [spouse], to [the spouse's] company, cooperation and aid in every conjugal relation." *McKinnon v. Chenowith*, 176 Or 74, 83, 155 P2d 944 (1945). The theory underlying a claim for loss of consortium is that, by virtue of marriage, a spouse receives certain benefits both tangible, as in material services, and intangible, such as companionship and affection, from the other spouse. Accordingly, when one spouse is injured, the uninjured spouse may lose those benefits and is entitled to compensation.

Plaintiffs contend, however, that Sandra Axen's damages should not be limited to the generally accepted elements of consortium but should be expanded to include the income that she lost, in addition to pension benefits, when she retired to take care of her injured husband. Plaintiffs concede that no reported Oregon case has upheld an award of such damages as part of a loss of consortium claim, but they argue that there is no principled reason not to do so. Although we agree with plaintiffs that Sandra Axen has suffered an economic loss by taking early retirement, we are not convinced that that loss is compensable under her claim for loss of consortium.

Plaintiffs cite a number of cases that they claim support their argument, but a closer examination of those cases reveals that, although the courts in those cases may have awarded the uninjured spouse certain economic damages, those damages did not include lost income. *See Ouachita Natl. Bank v. Tosco Corp.*, 686 F2d 1291, *reh en banc* 716 F2d 485 (8th Cir 1983); *Bernard v. United States*, 794 F Supp 608 (ED La 1991) *aff'd* 968 F2d 16 (5th Cir 1992); *Poirier v. United States*, 745 F Supp 23 (D Me 1990); *Ossenfort v. Assoc. Milk Producers, Inc.*, 254 NW2d 672 (Minn 1977); *Biddle v.*

Griffin, 277 A2d 691 (Del Super Ct 1970). In *Poirier*, *Ouachita Natl. Bank*, *Ossenfort*, and *Biddle*, the courts included the fact that the spouse had left work in their analyses of the claims but did not factor lost earnings into the final accountings. At most, the courts determined that a spouse who has left work to care for the injured spouse *may* be entitled to recover the reasonable value of the nursing care he or she provided. *See, e.g., Ossenfort*, 254 NW2d at 686; *Biddle*, 277 A2d at 692.[16]

A careful review of case law in other jurisdictions reveal that the majority of courts have concluded that the only economic damages available to an uninjured spouse as part of a claim for loss of consortium are those damages incurred in replacing the material services and support previously provided by the injured spouse. A few jurisdictions have also included the reasonable cost of care provided to the injured spouse by the uninjured spouse, but the majority have followed the rule that those costs are more properly included in the injured spouse's claim.[17] We need not decide whether Sandra Axen could recover the cost of providing care to her husband, however, because she sought only her lost income. On that claim, we adhere to the traditional rule and hold that lost income is not a proper subject of a damage award for

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[16] Plaintiffs also rely on *Lester v. Dunn*, 475 F2d 983 (DC Cir 1973). That reliance is misplaced. In *Lester*, the father of an injured child was awarded lost wages after he left work in order to care for the child. That case was decided under a theory of law separate and distinct from the theory of loss of consortium and has no application here.

[17] Some authorities have noted that the rule against allowing an uninjured spouse to recover either lost income or the value of nursing or other services is based on the fact that the injured spouse could recover the cost of such care and that to allow both would allow for double recovery. *See, e.g.*, 1 Prosser and Keeton, *The Law of Torts* § 125, at 933 (5th ed 1988 & Supp); 41 Am Jur 2d, *Husband & Wife* § 263, at 175-76 (1995).

loss of consortium. *See, e.g., Morgan v. Cenac*, 634 So 2d 60, 63 (La App 1994).

In its fifth assignment of error, AHP contends that the trial court erred when it denied AHP's motion to strike punitive damages.[18] First, AHP claims that punitive damages should have been stricken because there was no evidence that AHP knew or believed that amiodarone could cause optic neuropathy resulting in vision loss so that any failure to warn of that risk could not, as a matter of law, constitute "wanton disregard" for the safety of others, as *former* ORS 30.925 required for an award of punitive damages.[19] AHP did not make that argument to the trial court in its motion but, rather, argued only that its actions were not "wanton," as required by *former* ORS 30.925, because it had warned of optic neuritis and, therefore, had not "completely failed to warn about adverse reactions involving ocular problems." Accordingly, we decline to address whether there was sufficient evidence to show that AHP knew or should have known that amiodarone could cause optic neuropathy resulting in vision loss. *See Vancil*, 236 Or at 320-21.

Second, AHP argues, as it did to the trial court, that the fact that it had warned of "optic neuritis" was, as a

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[18] See note 11 above for an explanation of our use of a motion to strike as the proper term for AHP's motion.

[19] ORS 30.925 was amended in 1995. Or Laws 1995, ch 688, § 4. The amendments apply only to actions commenced on or after their effective date, which was September 9, 1995. Or Laws 1995, ch 688, § 5. Plaintiffs commenced this action on September 8, 1995. We therefore refer to the version of the statute that was in effect at that time. That version provided:

> "In a product liability civil action, punitive damages shall not be recoverable unless it is proven by clear and convincing evidence that the party against whom punitive damages [are] sought has shown wanton disregard for the health, safety and welfare of others."

ORS 30.925(1) (1993).

matter of law, sufficient under *former* ORS 30.925 to shield it from of a claim for punitive damages. AHP argues that the record shows "a good-faith attempt to warn physicians of what was known of any association between amiodarone and optic nerve damage[,]" thus precluding a finding of wantonness. Plaintiffs argue in response that the jury could have found that the label warning about "optic neuritis" was *not* a good-faith attempt to warn but, rather, a warning that was so inadequate that it, in itself, constituted a wanton disregard for the safety of others. We agree with plaintiffs.

For purposes of determining punitive damages, wanton misconduct is that which creates a substantial risk of harm to another and is purposely performed with an awareness of the risk and a disregard of the consequences. That definition is in keeping with the Oregon Supreme Court's statement that "[p]unitive damages * * * are a penalty for conduct that is culpable by reason of motive, intent, or extraordinary disregard of or indifference to known or highly probable risks to others." *Andor v. United Air Lines, Inc.*, 303 Or 505, 517, 739 P2d 18 (1987).

We conclude that there is sufficient evidence in the record for the jury to have found by clear and convincing evidence that AHP knew of the association between amiodarone use and optic neuropathy; that optic neuritis and optic neuropathy were not interchangeable diagnoses; that optic neuropathy could cause permanent vision loss; and that AHP made a conscious choice not to warn of optic neuropathy. Moreover, there is evidence from which the jury could have concluded that AHP's choice not to warn of optic neuropathy was driven, at least in part, by financial concerns related to its ability to market the product. Hence, there was sufficient evidence to permit the jury to conclude, by clear and convincing evidence, that AHP had acted with extraordinary disregard of or

indifference to known or highly probable risks to others. Accordingly, there was sufficient evidence under *former* ORS 30.925 to present the case for punitive damages to the jury.[20]

In its sixth assignment of error, AHP contends that the trial court erred "in allowing an award of punitive damages in a proceeding that failed to comply with due process requirements." [21] Specifically, AHP argues that it was denied due process because (1) the issue of punitive damages was decided by a non-unanimous jury; (2) the court allowed the jury to determine whether AHP had violated federal regulations; (3) AHP was not given notice of the conduct for which it would be punished or the severity of the penalty; (4) AHP was punished for lawful and uncharged conduct; (5) the punitive damages award constitutes an effort by Oregon to impose its regulatory policies on the rest of the country in violation of the Commerce Clause; [22] and (6) the jury's verdict was based on prejudice and passion, inflamed by the Kennedy press release.[23]

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[20] In its motion, AHP argued that, under *former* ORS 30.927, it was error for the court to submit punitive damages to the jury because there was no evidence that AHP had knowingly withheld information from the FDA in violation of FDA regulations. AHP does not reassert that argument on appeal.

[21] Both AHP's sixth and seventh assignments of error invoke due process rights and, in the case of some arguments, may seem redundant. There is, however, a qualitative difference between the due process argument made in the sixth assignment of error and that made in the seventh. Accordingly, we address the arguments separately, even though it results in some repetition. Additionally, we note that, although AHP originally contended at trial that both the Oregon and federal constitutions were implicated, the only issues raised on appeal are federal constitutional issues.

[22] US Const, Art 1, § 8, cl 3.

[23] See note 8 above.

Initially, we address plaintiffs' contention that AHP failed to preserve any of the above arguments. Plaintiffs contend that AHP cannot rely on any constitutional argument that it did not raise as an affirmative defense and argue that the only such defense raised was that "plaintiffs' claim for punitive damages violates the due process provisions of the United States Constitution and the Constitution of the State of Oregon." Plaintiffs further contend that, because AHP did not specify the manner in which due process was violated or seek a ruling on the defense prior to entry of judgment but, rather, waited until its motion for a new trial AHP cannot now rely on constitutional grounds for appeal. In the alternative, plaintiffs argue that AHP abandoned its constitutional defense when it informed the court that it would not discuss it in front of the jury. We disagree with those contentions.

AHP has raised a purely legal issue about whether the procedures by which punitive damages were awarded comports with due process. There would be no reason to present that issue to the jury, and it was not a waiver of the defense for AHP to state that it would not mention the defense to the jury. Whether the constitutional issues should have been raised earlier is a closer question, but we conclude that most of the issues were raised in a timely manner sufficient to allow the trial court to consider them which is the essence of the preservation requirement. *See Stranahan v. Fred Meyer, Inc.*, 153 Or App 442, 466 n. 19, 958 P2d 854, *rev allowed* 328 Or 115 (998) (rationale behind preservation rules is to give parties opportunity to present their positions and trial court opportunity to consider issues). Plaintiffs and the trial court were on notice, by virtue of AHP's twelfth affirmative defense, that AHP contended that an award of punitive damages would deny it due process. In its motion for a new trial, AHP specified the various ways in

which due process had been violated during the trial and asked the court for a ruling. We conclude that, for the most part, AHP's constitutional arguments have been preserved sufficiently for our review.

We do agree with plaintiffs, however, that AHP has failed to preserve two issues: the decision by a non-unanimous jury and the submission of legal issues to the jury. The proper time to object to both of those issues was at the time they first arose. Before any issues were submitted to the jury, the court and the parties engaged in an extensive discussion of the nine-juror rule in regard to compensatory and punitive damages, including a fairly complicated discussion about the verdict form. At no time did AHP object to having punitive damages decided by a non-unanimous jury or object to the final version of the verdict form. The same is true as to the issue of having the jury determine the meaning of certain federal regulations. There was extensive testimony by witnesses for both parties, as well as argument to the jury by both parties, about the meaning of those regulations. The trial court instructed the jury that, if it found that AHP had violated the regulations, then it could find that AHP had been negligent, unless it determined that AHP had acted reasonably under the circumstances. AHP did not object to that instruction on the ground that the court was submitting a legal issue to the jury. Accordingly, we conclude that AHP has failed to preserve the above two grounds for appeal.

AHP next argues that the award of punitive damages denied it due process, because it did not have sufficient notice of the conduct for it which it could be punished. Specifically, AHP argues that it had no notice that it would be punished for lawful promotional activities that took place outside of Oregon. AHP further contends that it could not have been expected to know that the jury

would conclude that it had violated federal regulations. We find those arguments to be without merit. First, under the Due Process Clause, notice of prohibited conduct is satisfied by existing statutory or common law. *Blume v. Fred Meyer*, 155 Or App 102, 114, 963 P2d 700 (1998); *see also TXO Production Corp. v. Alliance Resources Corp.*, 509 US 443, 465-66, 113 S Ct 2711, 125 L Ed 2d 366 (1993). The applicable statutes in this case are ORS 30.925 and 30.927. AHP had notice that, if the jury found (1) that AHP had acted with wanton disregard of the health, safety and welfare of others and (2) that AHP had knowingly withheld from the FDA information that was material and relevant to the injury suffered by Douglas Axen, then the jury could assess punitive damages. Second, AHP was not punished for its promotional activities outside of Oregon—it was punished for failing to warn Douglas Axen's physicians that amiodarone had been associated with optic neuropathy and vision loss. As a consequence of that failure to warn, Cordarone was prescribed to Douglas Axen in Oregon and was purchased and taken by him in Oregon. Douglas Axen's use of Cordarone ultimately led to his vision loss, again in Oregon. Any information submitted to the jury about AHP's promotional activities was for the purpose of determining the egregiousness of AHP's activities within Oregon, not as further grounds for punishment. Accordingly, AHP had constitutionally adequate notice of the conduct for which punitive damages could be assessed.

Nevertheless, AHP contends that the punitive award violated due process because it punished conduct that was lawful where it occurred and that had no effect on Oregon residents. *See BMW of North America, Inc. v. Gore*, 517 US 559, 572-73, 116 S Ct 589, 1597, 134 L Ed 2d 809 (1996). In a related argument, AHP contends that the punitive damage award represents an inappropriate at-

tempt by the State of Oregon to impose its regulatory policies on the entire country. We disagree with both contentions. We have determined that the jury could have concluded that AHP had failed to abide by the standard of care set forth in certain federal regulations and that Douglas Axen was injured as a result. That is not like the situation presented in *BMW*, where the plaintiff sought to force BMW to change its disclosure policies nationwide, even though BMW's then-current disclosure policies, although illegal in Alabama, were in keeping with the law in a number of other states. In that case, the United States Supreme Court concluded that punitive damages could be assessed only to the extent that those damages punished conduct that took place in Alabama. *BMW*, 517 US at 572-73. Here, the jury could have found that AHP had violated a statutorily established standard of care and further could have found that those violations led to its failure to warn. That failure to warn directly affected physicians and patients in Oregon, including Douglas Axen. As for AHP's contention that Oregon is barred from punishing it for any failure to abide by the federal regulations, we find nothing in the text of those regulations to indicate that the federal government has chosen to prevent them from being used to establish a standard of care in a common-law negligence action. *See, e.g., English v. General Electric Co*, 496 US 72, 89, 110 S Ct 2270, 2280, 110 L Ed 2d 65 (1990) ("ordinarily, state causes of action are not preempted solely because they impose liability over and above that authorized by federal law"); *Silkwood v. Kerr-McGee Corp.*, 464 US 238, 255, 104 S Ct 615, 625, 104 L Ed 2d 443 (1984) (traditional principles of state tort law apply with full force unless expressly supplanted by federal regulations); *see also Feldman v. Lederle Laboratories*, 125 NJ 117, 134-38, 592 A 2d 1176 (1991), *cert den* 505 US 1219, 112 S Ct 3027, 120 L Ed 2d 898 (1992) (same). AHP

has not identified any portion of the applicable regulations or of the legislative history of those regulations that indicate that Congress sought to supplant state tort law remedies when it decided to regulate the drug industry. To paraphrase the court in *Silkwood*, it may be that, to allow a punitive damage award of $20 million based on Oregon negligence law is regulatory in the sense that a drug manufacturer will be threatened with damages liability if it doesn't conform to state standards, but that is something that it appears Congress is quite willing to accept. *Silkwood*, 464 US at 256. Accordingly, we reject AHP's contrary contentions.

Finally, in its seventh assignment of error, AHP contends (1) that it was denied procedural due process when the trial court failed to make express findings as to the factors it considered when approving the jury's punitive damage award and (2) that the $20 million punitive damages award was grossly excessive and, therefore, a violation of substantive due process. We address each contention in turn.

AHP argues that due process requires a trial court to make findings of fact and state its conclusions of law on the record when it evaluated the constitutional validity of a jury's punitive damage award, so as to permit meaningful appellate review its decision. [*Sic.*] We disagree. The United States Supreme Court has concluded that a trial court need not articulate its reasons for upholding a punitive damage award, as long as the record indicates that the court gave the parties an adequate hearing and considered their arguments:

> "While it is always helpful for trial judges to explain the basis for their rulings as thoroughly as is consistent with the efficient dispatch of their duties, we certainly are not prepared to characterize the trial judge's failure to articulate the basis for his

denial of the motions for judgment notwithstanding the verdict and for remittitur as a constitutional violation."

TXO, 509 US at 465. Here, both parties submitted lengthy briefs on their post-verdict arguments, including AHP's due process claims. The court allowed adequate time for oral argument as well, at which both parties concentrated on the court's rulings about evidentiary issues and bifurcation. The court indicated that it had read and considered the parties' briefs, keeping in mind the size of the verdict. Although the court did not refer specifically to AHP's due process claims, the record indicates that the court was mindful of the claims when it made its final rulings on the post-verdict issues. Moreover, because the constitutional issue is purely a legal issue, the trial court's reasoning in support of its decision, while helpful, has no direct bearing on our review. *See Blume*, 155 Or App at 114. Accordingly, we conclude that AHP's procedural due process claim is without merit.

Next, AHP argues that the $20 million punitive damages award is unconstitutionally excessive. *See Oberg v. Honda Motor Co., Ltd.*, 320 Or 544, 555, 888 P2d 8 (1995), *cert den* 517 US 1219, 116 S Ct 847, 134 L Ed 2d 948 (1996) ("the Due Process Clause of the Fourteenth Amendment imposes a substantive limit on the size of punitive damages awards"). Plaintiffs argue that, under the facts of this case, the award, although large, is within constitutional limits.

"Punitive damages may properly be imposed to further a [s]tate's legitimate interests in punishing unlawful conduct and deterring its repetition." *BMW*, 517 US at 568. Only when an award can fairly be characterized as *grossly excessive* in relation to the state's interests does it become arbitrary and, hence, violate due process. *Id.* Moreover, a judgment that is a product of a fair proceeding is en-

titled to a strong presumption of validity. *TXO*, 509 US at 457. We conclude that, given the gravity of AHP's conduct, the extent of the economic and noneconomic damages suffered by plaintiffs and the seriousness with which actions such as those by AHP are viewed, the jury's award of punitive damages is not unconstitutionally excessive.

We begin the federal excessiveness inqury by identifying the state interests that the punitive damage award is designed to serve. *Blume*, 155 Or App at 114. In this case, the state has an interest in protecting Oregon residents against harm caused by the failure to give them and their physicians adequate warning of the dangerous side effects of prescription drugs. Moreover, the state has an interest in avoiding the costs of providing health care to patients harmed by mislabeled medications and an additional interest in preventing the loss of productive members of society. Because the potential harm to Oregon consumers is quite high—in this case, Douglas Axen was deprived of his sight—the state's interest in a punitive damage award that will have a significant effect on AHP's behavior is substantial.

Next, we examine the jury's award in light of the guideposts established by the United States Supreme Court in *BMW*. Those are (1) the degree of reprehensibility of the defendant's conduct; (2) the disparity between the harm and potential harm suffered and the punitive damage award; and (3) the difference between the award and the penalties authorized or imposed in comparable circumstances. *BMW*, 517 US at 575. Those are not equal factors, nor are they exclusive considerations. They are, however, an effective standard by which to evaluate the propriety of a punitive damage award.

The first factor, the reprehensibility of the defendant's conduct, is generally considered to be the most important,

and, therefore, the most heavily weighted. The Court cited three sub-factors in *BMW* that it associated with particularly reprehensible conduct: (1) whether the defendant's conduct was violent or threatened violence; (2) whether the defendant acted with trickery or deceit rather than through mere negligence; and (3) whether the defendant has engaged in repeated instances of misconduct. 517 US at 576-77. Although the first sub-factor is not applicable to this case, we conclude that an application of the second and third sub-factors demonstrates a high degree of reprehensibility on the part of AHP in its conduct toward plaintiffs.

As we have already noted, evidence was presented to the jury that, for a number of years before Douglas Axen's injury, AHP had actual knowledge of the association between amiodarone use and toxic optic neuropathy. Further, there was evidence that AHP knew for the same period of time that there was a qualitative difference between toxic optic neuropathy and toxic optic neuritis yet warned only of optic neuritis. Furthermore, AHP failed to change its labeling even though it continued to receive reports associated amiodarone use with vision loss and even though it was aware that its Canadian counterpart had been required to change its labeling to clarify the danger of vision loss. Finally, AHP had notice that the federal government was concerned with AHP's labeling and advertising practices, particularly with regard to what the government believed to be AHP's minimization of the potential side effects of its product.

Plaintiffs' theory was that AHP made a deliberate choice not to warn that its product might cause vision loss because it feared that such a warning would affect its profits. In other words, AHP deliberately placed misleading information on its packaging in order to preserve sales. Viewed in the light most favorable to plaintiffs, the evidence supports that theory. Our analysis of the first

factor, then, supports a conclusion that a high punitive damage award would be appropriate. As the United States Supreme Court has noted, the fact that a defendant has continued to engage in prohibited conduct while knowing or suspecting that it was wrong provides support for the argument that "strong medicine" (so to speak) is required to cure the defendant's disrepect for the law. *BMW*, 517 US at 576-77.

We next consider the relationship between the punitive damage award and the harm caused by AHP's conduct. Most courts, including this court, have at times approached this factor by noting the ratio of compensatory damages to punitive damages and then determining, under the particular facts of the case, whether the ratio is permissible. That approach, while useful, has had the unfortunate effect of causing parties to present, without further analysis, arguments comparing their ratio to that in other, unrelated, cases in order to support their contention that the award is or is not valid. Accordingly, we find it necessary to repeat the caveat stated in *Stranahan*:

> "[P]unitive damages awards are not evaluated based on a simple formula that compares the ratio of the compensatory damages to * * * the punitive damages. The United States Supreme Court has stated that punitive damages must bear a 'reasonable relationship' to compensatory damages. The Court also has indicated that there should be a 'reasonable relationship' between the punitive damages award and the harm that is likely to result from a defendant's conduct, as well as the harm that actually resulted. Thus, a punitive damage award 20 times the compensatory damage award might be proper in one case, but a punitive damages award twice the compensatory damages award might be excessive in another case.'

153 Or App at 466-67 (citations omitted). In addition, a higher ratio may be appropriate where the monetary value of the noneconomic harm is difficult to determine. *Id.* at 467.

Douglas Axen was awarded $1,907,265.75 in compensatory damages. That included economic damages of $407,265.75 and noneconomic damages of $1.5 million. Sandra Axen, in turn, was awarded $500,000 in noneconomic damages that we have upheld on appeal. Those compensatory damages at first might seem to be sufficiently large to deter AHP from further misconduct, so as to make a $20 million punitive damage award excessive, but other considerations support a large punitive damages award.[24] Unlike the plaintiff in *BMW*, who suffered only minor economic damage,[25] Douglas Axen lost the use of a vital sense. Although the jury awarded a significant sum in noneconomic damages, it is difficult to determine what sum would be adequate to make up for the loss of one's sight. Furthermore, unlike *BMW*, the

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[24] In *BMW*, the United States Supreme Court stated that, in some circumstances, low compensatory damages might support a higher ratio of punitive damages than would high compensatory damages, presumably on the ground that a high compensatory damage award would have a significant deterrent effect, making a high punitive damage award less necessary to deter misconduct. We conclude, however, that, in other cases, high compensatory damages may themselves be evidence of the egregiousness of the defendant's conduct and might, therefore, support a high ratio as well.

[25] In *BMW*, the plaintiff had discovered that the car that he had purchased had been repainted before he purchased it and as a result had lost value. The jury found that the plaintiff had suffered economic damages of $4,000 and no noneconomic damages. The United States Supreme Court determined that, under those circumstances, a punitive damages award of $2 million was excessive, particularly in light of the fact that there was no evidence that the plaintiff or any other consumer was threatened with any additional potential harm by BMW's policy of not disclosing minor repairs made before purchase.

potential that other consumers might suffer the harm suffered by Douglas Axen if AHP does not change its practices supports a large punitive damage award. Even if it is true, as AHP contends, that amiodarone-induced toxic optic neuropathy is rare, its consequences can be catastrophic. The State of Oregon has a strong interest in protecting its residents against such a catastrophe. And finally, although a defendant's ability to pay a large punitive damages award is not conclusive of the award's validity, *see, e.g., Parrott v. Carr Chevrolet, Inc.*, 156 Or App 257, 281, 965 P2d 440 (1998), it is appropriate to consider whether an award is of an amount sufficient to cause the defendant to change its practices. There is evidence that AHP's annual profits are such that a smaller award may simply be absorbed as a cost of doing business. Hence, we conclude that the fact that the punitive damage award is approximately eight times plaintiffs' compensatory damages is not, in itself, unconstitutional.[26]

The third factor discussed by the Supreme Court in *BMW* was the comparison between the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct. That factor recognizes the deference that a reviewing court should accord legislative judgments about appropriate penalties for the conduct at issue. *BMW*, 517 US at 583. AHP contends that the maximum penalty to which it was exposed for its conduct toward plaintiffs was approximately $60,000 in

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[26] Although punitive damages were sought and awarded to Douglas Axen alone, the harm caused by AHP's conduct includes the $500,000 in nonconomic damages suffered by Sandra Axen for loss of consortium. Hence, Sandra Axen's damages should be included in the calculation of the ratio between compensatory and punitive damages in the case. Even if we err in including Sandra Axen's damages in the calculation, the ratio of punitive damages to Douglas Axen's compensatory damages is approximately 10.5 to 1, which also does not violate the Due Process Clause under the facts of this case.

fines, significantly less than the punitive damages awarded by the jury. Plaintiffs argue in response that we should consider the fact that federal regulations allow the FDA to seize misbranded drugs and to enjoin manufacturers from distributing or selling misbranded drugs in evaluating the potential financial consequences to AHP of its misconduct.

Although AHP is correct that, under Oregon law, the possible criminal and administrative penalties that AHP could face for its conduct might not themselves be sufficiently large to give it notice that a severe economic penalty could be imposed for that conduct, we disagree with its contention that we should not consider the effects of an injunction on the sale of Cordarone because the State of Oregon has no authority to impose such a sanction. In *BMW*, the court examined the laws of various jurisdictions to determine whether the defendant had adequate notice that it might be subject to a multimillion dollar penalty. 517 US at 584. Because the manufacture, distribution and marketing of prescription drugs are subject to federal regulation, it is appropriate to refer to possible federal sanctions. While it is true that the State of Oregon does not have the power to impose those sanctions, their existence nevertheless indicates the seriousness with which conduct such as that in which AHP engaged is viewed by the federal government and the severity with which that conduct can be punished. Although we can only speculate as to the effect on AHP of a seizure of Cordarone or an injunction against its sale, there is evidence that AHP would suffer large economic losses from such an action. However, because there is a degree of uncertainty about that potential loss, we conclude that application of the third factor weighs neither for nor against the

jury's award.[27] Nevertheless, as we stated above, the various factors that bear on the constitutionality of a punitive damage award are not equal. We have already determined that the first and second factors strongly support a conclusion that the jury's award is constitutional. The fact that our consideration of the third factor is inconclusive does not change that conclusion. Under the totality of the circumstances, taking into account the historical validity of punitive damage awards designed to protect state interests and the gravity of the injury done in this case, we conclude that the punitive damage award of $20 million is not unconstitutionally excessive.[28]

Reversed as to Sandra Axen's claim for economic damages for loss of consortium; otherwise affirmed.

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[27] Because of our resolution of this issue, we need not decide how ORS 30.925 affects the evaluation of the third *BMW* factor. We note, however, that ORS 30.925 arguably gives sellers of products notice that Oregon juries are authorized to award punitive damages under the criteria established by the statute, which criteria do not require juries to correlate their awards with potential criminal and administrative penalties. Further, the statute represents a legislative endorsement of punitive damages, as long as those damages are awarded in accordance with the relevant statutes. That legislative endorsement arguably undercuts the significance of the third *BMW* factor, which is premised on deference toward legislative judgment about the appropriate level of punishment to be imposed for the conduct on which the award is based.

[28] In a related argument, AHP contends that the punitive damage award violates the excessive fines prohibition of the Eighth Amendment to the United States Constitution. We conclude that, in the case of a civil award of punitive damages, the excessive fines analysis is subsumed by the due process analysis dictated by the court in *BMW*. Because we have concluded that the award here does not violate due process, we need not separately address whether the award imposes an excessive fine.

APPENDIX C

FILED: April 21, 1999

IN THE COURT OF APPEALS
OF THE STATE OF OREGON

DOUGLAS J. AXEN and SANDRA AXEN,
Respondents,

v.

AMERICAN HOME PRODUCTS CORPORATION,
through its pharmaceutical division,
Wyeth-Ayerst Laboratories,
Appellant,

STATE OF OREGON and WAL-MART STORES, INC.,
Defendants.

(9509-06363; CA A97249)

Appeal from Circuit Court, Multnomah County.

Robert P. Jones, Judge.

On appellant's petition for reconsideration filed February 23, 1999. Karen O'Kasey, Margaret Hoffman, Schwabe, Williamson & Wyatt, John W. Vardaman, John G. Kester, Robert J. Shaughnessy and Williams & Connolly for the petition.

John Paul Graff, Jeffrey B. Wihtol and Graff & O'Neil, *contra.*

Before Edmonds, Presiding Judge, and Armstrong and Kistler,* Judges.

ARMSTRONG, J.

Reconsideration allowed; original opinion modified and adhered to as modified

*Kistler, J., *vice* Warren, P.J., retired.

ARMSTRONG, J.

Defendant American Home Products (AHP) seeks reconsideration of our decision in *Axen v. American Home Products Corp.*, 158 Or App 292, —— P2d —— (1999). AHP contends, *inter alia*, that we erred in stating that its objections to the admission of certain pharmaceutical industry newsletters that discussed AHP's problems with the federal Food and Drug Administration (FDA) over AHP's promotion of the drug Cordarone were not reasserted on appeal. AHP further contends that we were incorrect to assume that a punitive damage award that did not violate the Fourteenth Amendment's guarantee of due process could not violate the Eighth Amendment's prohibition of excessive fines. We grant reconsideration as to those issues and adhere to our original opinion as modified herein.

At trial, plaintiff offered two pharmaceutical industry newsletters that contained reports of correspondence between the FDA and AHP about AHP's promotion of Cordarone, the medication that was prescribed to plaintiff Douglas Axen and that caused his loss of vision. Plaintiff ordered the newsletters as evidence that AHP had notice that the FDA disapproved of AHP's marketing of Cordarone. The newsletters were offered as evidence of liability, along with a press release from Senator Edward Kennedy. *See Axen*, 158 Or App at 302 n 7. AHP objected to the newsletters, contending that (1) they were merely cumulative of the FDA letters; (2) their prejudicial effect outweighed their probative value in light of the admission of the FDA letters; and (3) they were hearsay. The court overruled those objections.

On appeal, AHP argued that the trial court erred when it "improperly allowed the jury to consider an inflamma-

tory press release and accusations of misconduct unrelated to the injury." In an introductory sentence to its first assignment of error, AHP referred to the newsletters by their exhibit numbers only, in conjunction with a list of exhibit numbers that appeared in the court ruling to which AHP objected. The other exhibit numbers were those of the press release and an AHP internal memorandum referring to the press release. AHP did not however, specifically identify the newsletter as a subject of the appeal. It referred to documents "related" to the press release, but the newsletters bore no relation to that release, which they predated. Moreover, at no point in either its opening or reply briefs did AHP make any argument whatsoever about the newsletters. Indeed, plaintiffs pointed out in their brief that AHP had *not* reasserted its objections to the newsletters on appeal and AHP did not challenge that assertion in its reply brief. The entirety of AHP's first assignment of error is devoted to a discussion of the press release and the FDA letters.

The mere fact that the exhibit numbers for the newsletters were included in a ruling about which AHP complained on appeal is insufficient for use to consider the objection to those newsletters on appeal. It is not unusual for a party to assert error on appeal to only a portion of a ruling, and, without further specificity from an appellant, we cannot assume that an argument made on appeal about one exhibit was intended to cover all exhibits. The ruling in question also dealt with the press release, which AHP discussed in great detail. Because AHP's appeal contained a great deal of information about the press release and about the FDA letters and, apart from the passing reference to the exhibit numbers, nothing whatsoever about the newsletters, it is reasonable to conclude that AHP challenged only the admission of the press release and the FDA letters. While it is true that the news-

letters contained much the same information as the FDA letters, we cannot assume that AHP's arguments about the FDA letters were intended to apply to the newsletters as well. AHP did not make any statement that could be interpreted as conveying that intention. Accordingly, we adhere to our conclusion that, on appeal, AHP failed to reassert its objection to the newsletters.[1]

The second issue we address on reconsideration is whether we erred in failing to address AHP's Eighth Amendment challenge to the punitive damage award. AHP contended that the fact that the state is entitled under ORS 18.540 to a portion of the punitive damage award requires the court to determine whether the award violates the Eighth Amendment's prohibition against excessive fines. In our original opinion, we disposed of that assignment error in a footnote, stating that our treatment of AHP's due process argument necessarily subsumed any excessive fine argument. On reconsideration, we conclude that it was error to do that because the issues are analytically distinct. The result of our original opinion is not changed, however, because, as plaintiffs point out, we addressed the effect of the Eighth Amendment on the interplay of a punitive damage award and ORS 18.540 in *Tenold v. Weyerhaeuser Co.*, 127 Or App 511, 873 P2d

---

[1] Furthermore, the objections that AHP made at trial to the admission of the newsletters differ from the arguments that it made at trial and on appeal about the FDA letters. Those differences bolster our conclusion that AHP did not challenge the admission of the newsletters on appeal, because its appellate arguments did not address the objections that it had made below to those newsletters.

Such differences led us to conclude that the objections that AHP raised on appeal to the admission of the Kennedy press release were unpreserved at trial and would lead us to the same conclusion with regard to the newsletters, if we were to conclude that AHP *had* challenged their admission on appeal.

413 (1994), and concluded that it did not apply to a civil case in which the government has no *prosecutorial* role. We reasoned that, because the State of Oregon had no role in initiating or prosecuting the action, there was no opportunity for governmental abuse of its prosecutorial power and, therefore, no Eighth Amendment violation. We see no need to revisit *Tenold* at this time.[2]

Reconsideration allowed; original opinion modified and adhered to as modified.

---

[2] AHP argues that *Tenold* was incorrectly decided because it did not discuss the United States Supreme Court decisions in a number of cases involving civil forfeitures. In each of those cases, however, the federal or state government was directly involved in the initiation and prosecution of the action. Accordingly, the reasoning in *Tenold* is not in conflict with those decisions.

APPENDIX D

[Filed Feb. 27, 1997]

IN THE CIRCUIT COURT
OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

Case No. 9509-06363

DOUGLAS J. AXEN and SANDRA AXEN,
Plaintiffs,

vs.

AMERICAN HOME PRODUCTS CORPORATION
through its Pharmaceutical Division,
WYETH-AYERST LABORATORIES;
Defendant.

MONEY JUDGMENT

This action came regularly before the undersigned judge of the above-entitled court. Plaintiffs appeared in person and through Jeffrey B. Wihtol, thier attorney, and defendant appeared through its attorneys, Margaret Hoffmann and Nancy Erfle, and Schwabe, Williamson & Wyatt. Thereafter, a jury was duly impaneled and sworn, evidence was introduced by the parties, arguments were made to the jury on behalf of the respective parties, and the jury, having been instructed upon all matters of law, and having retired to deliberate upon its verdict, did thereafter on the 20th day of February, 1997, return into court two verdicts in favor of plaintiffs, which, were in the following forms:

VERDICT 1 (Douglas J. Axen)

We, the jury, find:

1. Was the defendant negligent in one or more of the ways alleged in the plaintiff's complaint, and, if so, was such negligence a cause of damage to plaintiff Douglas J. Axen?

ANSWER: Yes X
No —

If your answer to question 1 is "No," your verdict is for the defendant. Your presiding juror should sign this verdict form. Do not answer any more questions.

If your answer to question 1 is "Yes," proceed to question 2.

2. What are the plaintiff Douglas J. Axen's damages?

ANSWER: Economic Damages $407,265.75
(May not exceed the sum of $407,265.75)
Noneconomic Damages $1,500,000.00
(May not exceed the sum of $1,500,000.00)

At least the same nine of you must agree on the answer to both questions.

DATED this 20th day of February, 1997

/s/ Christine Rachko
Presiding Juror

and,

VERDICT 2 (Sandra Axen)

We, the jury, find:

INSTRUCTION: Only answer the questions on this verdict if you have found for plaintiff Douglas J. Axen on Verdict 1.

1. Was defendant's negligence a cause of damage to plaintiff Sandra Axen?

ANSWER: Yes X
No —

If your answer to question 1 is "No," your verdict is for the defendant. Your presiding juror should sign this verdict form. Do not answer any more questions.

If your answer to question 1 is "Yes," proceed to question 2.

2. What are the plaintiff Sandra Axen's damages?

ANSWER: Economic Damages $436,392.00
(May not exceed the sum of $436,392.00)

Noneconomic Damages $500,000.00
(May not exceed the sum of $500,000.00)

At least the same nine of you must agree on the answer to both questions.

DATED this 20th day of February, 1997

/s/ Christine Rachko
Presiding Juror

The court reconvened on February 21 and arguments from counsel regarding the issue of punitive damages were made to the jury. The jury, having been instructed upon all matters of law, and having retired to deliberate upon its verdict on the punitive damages issue, did thereafter on the 21st day of February, 1997, return into court a verdict in favor of plaintiff, which was in the following form:

VERDICT 3 (Punitive Damages)

We, the jury, find:

INSTRUCTION: At least the same nine jurors who agree on the answers to the question or questions in Verdict 3 must also have been the jurors who agreed to the answers on question 1 and question 2 of Verdict 1 (Douglas Axen).

1. Has plaintiff Douglas J. Axen shown by clear and convincing evidence that the defendant acted with wanton disregard for the health, safety, and welfare of others?

ANSWER: Yes X
No —

If your answer to question 1 is "No," your verdict is for the defendant. Your presiding juror should sign this verdict form. Do not answer any more questions.

If your anwser to question 1 is "Yes," proceed to question 2.

2. Has plaintiff Douglas Axen shown by clear and convincing evidence that defendant violated applicable FDA regulations by knowingly withholding or misrepresenting to the FDA or prescribing physicians information

that was material and relevant to the harm that plaintiff Douglas Axen claims he suffered?

ANSWER: Yes X
No —

If your answer to question 2 is "No," your verdict is for the defendant. Your presiding juror should sign this verdict form. Do not answer any more questions.

If your answer to question 2 is "Yes," proceed to question 3.

3. What are plaintiff Douglas J. Axen's punitive damages, if any?

ANSWER: Punitive Damages $20,000,000,00
(May not exceed the sum of
$20,000,000.00)

At least the same nine of you must agree on the answers to all questions answered on this verdict form.

DATED this 21st day of February, 1997

/s/ Christine Rachko
Presiding Juror

The matter now coming on for judgment upon the foregoing verdicts, it is hereby

ADJUDGED that plaintiffs Douglas J. and Sandra Axen recover from and have judgment against defendant American Home Products Corporation, through its Pharmaceutical Division, Wyeth-Ayerst Laboratories, as detailed below, and that execution issue therefor:

MONEY JUDGMENT (Douglas Axen)

(1) Judgment Creditors: Douglas J. Axen (as to all damages) and State of Oregon (as to a portion of punitive damages only)*

Judgment Creditor Douglas J. Axen's Attorney: Jeffrey B. Wihtol

(2) Judgment Debtor: American Home Products Corporation, through its Pharmaceutical Division, Wyeth-Ayerst Laboratories

(3) Amount of Judgment:

Compensatory:

$1,907,265.75 (exclusive of costs and disbursements)

Punitive:

$20,000,000.00 (exclusive of costs and disbursements)

(4) Pre-judgment Interest: n/a

(5) The Judgment Creditors are also owed post-judgment interest at the rate of 9% simple interest from the date of entry of this judgment on a balance of $21,907,265.75 plus costs and disbursements.

(6) The money judgment also includes an award of costs and disbursements. The amount of these items will be determined subsequently under ORCP 68C.

* Plaintiffs dispute the State of Oregon's right and interest in any of the damages.

MONEY JUDGMENT (Sandra Axen)

(1) Judgment Creditor: Sandra Axen
Judgment Creditor's Attorney: Jeffrey B. Wihtol,

(2) Judgment Debtor: American Home Products Corporation, through its Pharmaceutical Division, Wyeth-Ayerst Laboratories,

(3) Amount of Judgment $936,392.00 (exclusive of costs and disbursements)

(4) Pre-judgment Interest: n/a

(5) The Judgment Creditors are also owed post-judgment interest at the rate of 9% simple interest from the date of entry of this judgment on a balance of $936,392.00 plus costs and disbursements.

(6) The money judgment also includes an award of costs and disbursements. The amount of these items will be determined subsequently under ORCP 68C.

DATED: February 27, 1997.

/s/ R. Jones
The Honorable ROBERT P. JONES
Circuit Court Judge

Proceedings reported by official court reporter.

PRESENTED BY:

/s/ Jeffrey B. Wihtol
JEFFREY B. WIHTOL, OSB # 78108
Attorney for Plaintiffs

APPENDIX E

IN THE CIRCUIT COURT
OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

No. A9509-06363

DOUGLAS J. AXEN and SANDRA AXEN
Plaintiffs,

vs.

AMERICAN HOME PRODUCTS CORPORATION
through its Pharmaceutical Division,
WYETH-AYERST LABORATORIES;
Defendants.

TRANSCRIPT OF PROCEEDINGS

BE IT REMEMBERED that the above-entitled matter came on regularly for trial before the Honorable, Robert P. Jones, Judge of the Circuit Court of the County of Multnomah, State of Oregon, commencing at the hour 8:00 a.m. on Tuesday, the 9th day of April, 1997.

APPEARANCES

Jeffrey B. Wihtol and John Paul Graff
Attorneys at Law
Appearing on behalf of the Plaintiff;

Ms. Margaret Hoffmann, Ms. Nancy Erfle and Ms. Karen O'Kasey
Attorneys at Law
Appearing on behalf of the Defendant.

[2] PROCEEDINGS

Portland, Oregon
Tuesday, April 9, 1997
8:00 a.m.

THE COURT: This is the time we've set for oral arguments on the defendant's motions for a new trial and a JNOV in Axen against American Home.

I'll hear from the moving party, please.

* * * *

[25] THE COURT: . . . The written documents submitted by both sides have been most helpful, very lengthy, very comprehensive, and, again, post-verdict, in view of the size of the verdict, I've given considerable thought to the rulings that the parties raised this morning.

But I've come to the conclusion that I'm [26] satisfied that the rulings that I made were appropriate, and the motion for a new trial and the motion for a judgment notwithstanding the verdict will be denied.

I want to thank you for your presentation.

APPENDIX F

[Filed Apr. 21, 1997]

IN THE CIRCUIT COURT
OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

Case No. 9509-06363

DOUGLAS J. AXEN and SANDRA AXEN,
Plaintiffs,

vs.

AMERICAN HOME PRODUCTS CORPORATION
through its Pharmaceutical Division,
WYETH-AYERST LABORATORIES;
WAL-MART STORES, INC.;
and STATE OF OREGON,
Defendants.

ORDER DENYING ALTERNATIVE MOTIONS FOR NEW TRIAL AND JUDGMENT NOTWITHSTANDING THE VERDICT

Defendant American Home Products Corporation's Alternative Motions For New Trial And Judgment Notwithstanding The Verdict having come on regularly for hearing before The Honorable Robert P. Jones, Circuit Court Judge, in the above-entitled court on Wednesday, April 9, 1997, defendants appearing by and through their counsel, Margaret Hoffman, Karen O'Kasey, and Nancy Erfle of Schwabe, Williamson & Wyatt, and plaintiffs appearing by their counsel, Jeffrey B. Wihtol and Toby Graff, and the court having heard the arguments of counsel and con-

sidered the memoranda and documents submitted by the parties in support of their respective positions, and the trial court's file, now, therefore,

IT IS HEREBY ORDERED that Defendant's Alternative Motions For New Trial And Judgment Notwithstanding The Verdict be and hereby are denied in their entirety.

DATED this 21st day of April, 1997.

/s/ Robert P. Jones
The Honorable Robert P. Jones
Circuit Court Judge

SUBMITTED BY:

/s/ Jeffrey B. Wihtol
Jeffrey B. Wihtol, OSB No. 78108
Of Attorneys for Plaintiffs

APPENDIX G

CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitutional Provisions

The Eighth Amendment to the Constitution of the United States provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the Constitution of the United States provides in relevant part:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statutes

Oregon Revised Statutes §18.540 (1987) provided: *

(1) Upon the entry of a judgment including an award of punitive damages, the Department of Justice shall become a judgment creditor as to the punitive damages portion of the award to which the Criminal Injuries Compensation Account is entitled pursuant to paragraph (c) of this subsection, and the punitive damage portion of an award shall be allocated as follows:

---

* Version applicable to actions commenced prior to September 9, 1995.

(a) The attorney for the prevailing party shall be paid the amount agreed upon between the attorney and the prevailing party.

(b) One-half of the remainder shall be paid to the prevailing party.

(c) One-half of the remainder shall be paid to the Criminal Injuries Compensation Account to be used for the purposes set forth in ORS chapter 147. However, if the prevailing party is a public entity, the amount otherwise payable to the Criminal Injuries Compensation Account shall be paid to the general fund of the public entity.

(2) The party preparing the proposed judgment shall assure that the judgment identifies the judgment creditors specified in subsection (1) of this section.

(3) Upon the entry of a judgment including an award of punitive damages, the prevailing party shall provide notice of the judgment to the Department of Justice.

(4) Whenever a judgment includes both compensatory and punitive damages, any payment on the judgment by or on behalf of any defendant, whether voluntary or by execution or otherwise, shall be applied first to compensatory damages, costs and court-awarded attorney fees awarded against that defendant and then to punitive damages awarded against that defendant unless all affected parties, including the Department of Justice, expressly agree otherwise, or unless that application is contrary to the express terms of the judgment.

(5) Whenever any judgment creditor of a judgment which includes punitive damages governed by this section receives any payment on the judgment by or on behalf of any defendant, the judgment creditor receiving the payment shall notify the attorney for the other judgment

creditors and all sums collected shall be applied as required by subsections (1) and (4) of this section, unless all affected parties, including the Department of Justice, expressly agree otherwise, or unless that application is contrary to the express terms of the judgment.

Oregon Revised Statutes § 18.540 provides: *

Distribution of punitive damages; notice to Department of Justice; order of application.

(1) Upon the entry of a verdict including an award of punitive damages, the Department of Justice shall become a judgment creditor as to the punitive damages portion of the award to which the Criminal Injuries Compensation Account is entitled pursuant to paragraph (b) of this subsection, and the punitive damage portion of an award shall be allocated as follows:

(a) Forty percent shall be paid to the prevailing party. The attorney for the prevailing party shall be paid out of the amount allocated under this paragraph, in the amount agreed upon between the attorney and the prevailing party. However, in no event may more than 20 percent of the amount awarded as punitive damages be paid to the attorney for the prevailing party.

(b) Sixty percent shall be paid to the Criminal Injuries Compensation Account of the Department of Justice Crime Victim's Assistance Section to be used for the purposes set for in ORS chapter 147. However, if the prevailing party is a public entity the amount otherwise payable to the Criminal Injuries Compensation Account shall be paid to the general fund of the public entity.

---

* As amended by 1995 Or. Laws 688, §§ 1 and 5, effective for actions commenced on or after September 9, 1995.

(2) The party preparing the proposed judgment shall assure that the judgment identifies the judgment creditors specified in subsection (1) of this section.

(3) Upon the entry of a verdict including an award of punitive damages, the prevailing party shall provide notice of the verdict to the Department of Justice. In addition, upon entry of a judgment based on a verdict that includes an award of punitive damages, the prevailing party shall provide notice of the judgment to the Department of Justice. The notices required under this subsection must be in writing and must be delivered to the Department of Justice Crime Victim's Assistance Section in Salem, Oregon within five days after the entry of the verdict or judgment.

(4) Whenever a judgment includes both compensatory and punitive damages, any payment on the judgment by or on behalf of any defendant, whether voluntary or by execution or otherwise, shall be applied first to compensatory damages, costs and court-awarded attorney fees awarded against that defendant and then to punitive damages awarded against that defendant unless all affected parties, including the Department of Justice, expressly agree otherwise, or unless that application is contrary to the express terms of the judgment.

(2)

No. 99-784

Supreme Court, U.S.
FILED
DEC 21 1999
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

AMERICAN HOME PRODUCTS CORPORATION,
Petitioner,

v.

DOUGLAS J. AXEN,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Oregon

---

BRIEF IN OPPOSITION

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December 21, 1999

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LIST OF PARTIES

Contrary to the caption of the petition, the State of Oregon is not a respondent in these proceedings. Rule 12.6. See, discussion at pages 3-4, *infra*. The only parties are petitioner American Home Products Corp. and respondent Douglas J. Axen.

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BRIEF IN OPPOSITION

Respondent Douglas J. Axen submits this brief in opposition to the petition for a writ of certiorari filed by petitioner American Home Products, Inc. in this case.

STATEMENT OF THE CASE

A. Introduction and Background.

This case is not an appropriate vehicle for addressing either question presented by petitioner. As a result of a recent development in Oregon law, the award of punitive damages in this case may not raise any Eighth Amendment issue at all. Oregon's punitive damages split-recovery statute, Or. Rev. Stat. § 18.540, has been held to violate the takings clause, Article I, Section 18, of the Oregon Constitution in another case, and the matter is currently on appeal to the Oregon Court of Appeals.[1] If that ruling is affirmed, the Excessive Fines Clause does not apply to punitive damages awards in civil actions between private litigants in Oregon because the government neither seeks to impose a monetary sanction on an individual nor is entitled to a share of the damages awarded. *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 272, 275-76 (1989).

In addition, the trial court's failure to state reasons for affirming the punitive damages award does not present a substantial federal question. Not only did petitioner fail to request an explanation from the trial court, but a plurality of this Court has already held that a trial court's failure to articulate reasons for affirming a punitive dam-

[1] The split-recovery statute in effect at all times material to these proceedings is Or. Rev. Stat. § 18.540 (1991). That statute is correctly reproduced in the appendix to the petition at A. 59a-61a. There, however, it is incorrectly designated "Or. Rev. Stat. 61a. It is incorrectly designated "Or. Rev. Stat. § 18.540 (1987)." Unless indicated otherwise, all references to Or. Rev. Stat. § 18.540 in this brief are to the 1991 version of the statute.

ages award challenged on grounds of excessiveness is not a constitutional violation. *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 465 (1993) (opinion of Stevens, J.).

1. Petitioner's statement of facts is incomplete and misleading. When the circumstances giving rise to the jury's award of damages are properly understood, it is plain that this case presents no constitutional issue warranting review by this Court. Based on those circumstances, the Court of Appeals of Oregon held that there was sufficient evidence to support an award of punitive damages to respondent and that $20 million was not an excessive award under *BMW of No. America, Inc. v. Gore*, 517 U.S. 559 (1996). Petitioner does not challenge those rulings here.

In August, 1994, respondent, then age 56, was diagnosed as having a heart condition for which his cardiologist prescribed amiodarone, a drug distributed by petitioner in the United States and Canada under the trade name of Cordarone. A. 4a. In September, respondent first noticed changes in his vision but did not associate them with amiodarone. A. 4a; Tr. 869. Respondent's sight deteriorated further in October, and he complained about the problem to his cardiologist. A. 4a; Tr. 870, 1783. The cardiologist referred respondent to an ophthalmologist, who discovered optic nerve swelling and hemorrhaging in each eye and recommended that respondent discontinue taking amiodarone. A. 4a; Tr. 1783, 1750-52. On November 7, 1994, respondent stopped using the drug on instructions from his cardiologist. A. 5a; Tr. 870-72, 1794. Respondent's vision continued to deteriorate to the point where he became legally blind. A. 5a; Tr. 626-27, 822, 1753-55; PX. 1, 30. Respondent was eventually diagnosed as suffering from amiodarone-induced toxic optic neuropathy, which caused irreversible degeneration

and atrophy of the optic nerve in each eye. A. 5a; Tr. 1753-1755.

2. Respondent commenced this action against petitioner, the State of Oregon, and Wal-Mart Stores, Inc., in the Circuit Court for Multnomah County, Oregon, seeking compensatory and punitive damages.[2] The State, which operated the hospital where respondent's treating physicians practiced, and Wal-Mart, which sold the drug to respondent, were dismissed as parties before trial, and they took no further part in the proceedings. The jury awarded respondent $1,907,265.75 as compensatory damages and $20 million as punitive damages. Judgment was entered on the verdict. The judgment designated the State of Oregon as a judgment creditor with respect to a portion of punitive damages, as required by Or. Rev. Stat. § 18.540. A. 53a. The trial court denied petitioner's post-verdict motions for new trial challenging the amount of punitive damages as excessive. A. 58a. The Court of Appeals of Oregon affirmed the judgment, A. 47a, 52a, and the Supreme Court of Oregon declined to review that decision. A. 1a.

The State of Oregon was not designated as an adverse party in petitioner's notice of appeal.[3] Respondent filed a notice of cross-appeal challenging the constitutionality of the split-recovery statute, Or. Rev. Stat. § 18.540. The State was designated as the adverse party in the cross-

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[2] Respondent's wife, Sandra Axen, was also a plaintiff in that action. She was awarded $936,392 as damages for loss of consortium, which the court of appeals reduced to $500,000. Her portion of the judgment is not an issue in this Court.

[3] Although the State had been dismissed from the action, it continued to be designated as a defendant in the title of the action. Under Oregon law, a notice of appeal must contain the title of the action designating all of the parties named in the trial court. Or. Rev. Stat. § 19.250(1). Petitioner's notice of appeal accordingly designated the State of Oregon as a defendant but not as an adverse party in the appeal.

appeal. Upon a joint motion by respondent and the State to which petitioner did not object, the cross-appeal was dismissed for want of appellate jurisdiction on the grounds that a justiciable controversy did not yet exist between respondent and the State on the constitutionality of Or. Rev. Stat. § 18.540. After the cross-appeal was dismissed, the State took no further part in proceedings before the Court of Appeals of Oregon and the Supreme Court of Oregon. It, like Wal-Mart Stores, Inc., was designated a defendant in the decisions of those courts. A. 1a, 2a. Therefore, Oregon was not a party to the appeal in the state courts and, contrary to the caption of the petition here, is not properly a party to the proceedings in this Court. Its sole interest is as a non-party judgment creditor with respect to a portion of the punitive damages awarded to the respondent.

B. Petitioner Withheld Information From Physicians And The FDA In Knowing Violation Of Federal Regulations.

Oregon law prohibits punitive damages from being awarded against a pharmaceutical company unless the plaintiff proves, by clear and convincing evidence,

> "that the [company], either before or after making the drug available for public use, knowingly in violation of applicable Federal Food and Drug Administration regulations withheld from or misrepresented to the agency or prescribing physician information known to be material and relevant to the harm which the plaintiff allegedly suffered."

Or. Rev. Stat. § 30.927(2). There was clear and convincing evidence that petitioner knowingly violated several federal regulations.

1. The Food, Drug and Cosmetics Act prohibits distribution of a drug "if its labeling is false or misleading in any particular." 21 U.S.C. §§ 331(a) and 352(a).

Labeling includes not only the package insert, but also advertising and promotional materials. 21 CFR § 202.1 (*l*)(2); Tr. 1006. Labeling on or in the package must include a "Warnings" section which:

> ". . . shall describe serious adverse reactions and potential safety hazards, limitations in use imposed by them, and steps that should be taken if they occur. *The labeling shall be revised to include a warning as soon as there is reasonable evidence of an association of a serious hazard with a drug; a causal relationship need not have been proved.*"

21 CFR § 201.57(e) (emphasis added). Thus, if a pharmaceutical company obtains reasonable evidence of a serious hazard associated with an approved drug, the company must add or strengthen its warnings. Because of the FDA's paramount interest in public safety, neither proof of a causal relationship nor prior approval from the FDA is necessary. 21 CFR §§ 201.57(e), 314.70(b)(3) and 314.70(c)(2)(i); PX. 49; Tr. 1005-08.

Petitioner was aware of the medical literature that associated the risk of permanent vision loss with amiodarone. Tr. 1121-22, 1130-31, 1184. It conceded at trial that it did not warn American physicians of this risk in the package insert, promotional materials, "Dear Doctor" letters, or otherwise. Tr. 1033-34, 1208, 1210-11, 1587. Nor did petitioner caution American physicians to watch for early signs of vision loss or recommend regular eye examinations to patients taking the drug. PX. 3; Tr. 1204.

2. Even before the FDA authorized the marketing of amiodarone in the United States, petitioner knew of concerns that a risk of permanent vision loss might be associated with the drug. In 1984, the FDA Advisory Committee that recommended approval of amiodarone expressed concern about the lack of detailed, well-controlled clinical studies, the extraordinary risks associated with the

drug, and the prospect of "permanent loss of vision," which some members believed had not been adequately studied or researched. PX. 46 at 43, 58-64, 69, 81-82, 199-200, 230-33, 237-42. The Committee recommended FDA approval, but also recommended further research and study of the drug's risks. PX. 46 at 242, 244-45; Tr. 345-46. The FDA approved amiodarone for sale in the United States in late 1985, subject to the condition that petitioner "review regularly all published clinical literature on amiodarone, as well as any other data of interest, so that the labeling can be modified and updated as needed" and provide to the FDA "a review of new literature approximately quarterly with recommendations for labeling revision as needed." PX. 2; Tr. 346-49, 992-93, 1235.

Two federal regulations, 21 CFR §§ 314.80 and 314.81, also required petitioner to make certain reports to the FDA. Under 21 CFR §§ 314.80(b) and (c), petitioner was required to review reports in the scientific literature, as well as unpublished scientific papers, for references to adverse drug experiences involving amiodarone and to notify the FDA of those reports. A serious or unexpected adverse experience like vision loss that is not listed in the labeling needed to be reported to the FDA no later than 15 days after petitioner learned of it. 21 CFR §§ 314.80(a) and 314.80(c)(1)(I). A. 22a. In addition, 21 CFR § 314.81 required petitioner to submit to the FDA a comprehensive report each year within 60 days of the anniversary date of approval of petitioner's application to market amiodarone. The report was to include published clinical trials of the drug or abstracts of those trials, conducted by or otherwise obtained by petitioner.

Within a year after FDA approval, reports associating amiodarone use with vision loss began to appear in the medical literature. Petitioner knew of these reports as they were published. Tr. 1121-22, 1183-84. Between

1986 and 1993, at least ten articles appeared in the medical literature documenting or discussing the association between amiodarone and optic neuropathy or vision loss. PX. 16, 17, 18, 21, 22, 24, 25, 26, 27 and 28. Two of these—the Mayo Clinic and the Mansour articles—are especially important.[4] In violation of the terms of the FDA's approval and 21 CFR §§ 314.80 and 314.81, petitioner did not submit either article or otherwise report the information contained in them to the FDA. A. 22a, n. 13; PX. 2, 25; Tr. 361, 1012-13, 1217, 1409-10, 1415, 2012.

C. Petitioner Acted In Wanton Disregard For The Health, Safety And Welfare Of Persons In Oregon Who Use Amiodarone.

There was clear and convincing evidence that petitioner's conduct showed wanton disregard for the health, safety and welfare of amiodarone users in Oregon. In May 1988, petitioner proposed to modify its labeling for amiodarone to include "optic neuritis" as an adverse reaction occurring in less than one percent of patients. PX. 60. The FDA approved the change, but again reminded petitioner of its duty to report scientific literature to the FDA. PX. 61. Petitioner had not reported the

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[4] The first article, "Optic Neuropathy and Amiodarone Therpay," was published in 1987 in *Mayo Clinic Proceedings*. It described the results of a study of a number of patients undergoing amiodarone therapy at Mayo Clinic. PX. 18. Thirteen of the patients developed optic neuropathy, eight of whom suffered vision loss. The incidence of optic neuropathy was 1.79 percent, six times greater than the 0.3 percent incidence in an age-matched population. The authors found this sixfold increase to be significant and stated the loss of vision could be "severe and irreversible or recovery could be prolonged." They recommended amiodarone patients undergo thorough eye examinations, including periodic evaluation of the ocular fundus. PX. 18. The second article, by Dr. Mansour and others, was published a year later in the *Journal Of Clinical Neuro-Ophthalmology*. This was the only published report of extensive histopathologic studies of the toxic effect of amiodarone on the optic nerve. PX. 25.

Mayo Clinic or Mansour articles to the FDA, and the addition of "optic neuritis" as a possible adverse reaction did not inform cardiologists that permanent visual loss may occur. Tr. 971-72, 1033-34.

Petitioner has had the contractual right to market, distribute and promote amiodarone in Canada since September 1987, PX. 37, 38, 39, and its Canadian product is identical to its American product. PX. 4; Tr. 473. In September 1988, four months after petitioner added optic neuritis to the rare adverse reactions section of the American package insert, its Canadian subsidiary sent the Mayo Clinic article to the Canadian counterpart of the FDA with a request for approval to and a warning in the Canadian labeling for "some cases of visual impairment and decreased visual acuity in up to 2% of patients." PX. 5. The Canadian agency found the proposed warning inadequate "based on the submitted data," and required the following warning:

> ". . . Cases of optic neuropathy, usually resulting in visual impairment have been reported in patients treated with Cordarone. A causal relationship to the drug has not been clearly established. If such symptom appears, prompt ophthalmologic examination is recommended. Appearance of optic neuropathy calls for re-evaluation of Cordarone therapy. . . .
>
> "Regular ophthalmological examination, including fundoscopy and slit lamp examination, is recommended during administration of Cordarone."

PX. 6. It also required that optic neuropathy be added to the list of adverse ophthalmologic reactions, "in up to two percent of patients." *Id.* The Canadian labeling has contained these warnings since October 1988. PX. 7-15.

Petitioner was aware of this change in the Canadian labeling, but did not believe the American warning needed to be changed, based "on the experience . . . in our

country." Tr. 1185-86. That experience included the Mayo Clinic article that prompted the additional warnings in Canada but was withheld from the FDA.

By May, 1989, petitioner was in possession of a confidential memorandum from the European manufacturer of amiodarone which reviewed much of the literature on the association between amiodarone use and optic neuropathy and concluded:

> "These data thus require careful follow-up in the context of the pharmacovigilance organizations set up by the SANOFI Group at international level. For the moment and in view of the potential severity of the problems reported (possible progression to optic atrophy), it would seem ethical to complete the product information for physicians concerning the drug as suggested in the attached covering letter."

PX. 65. Petitioner did not produce the attached letter, so it was unavailable at trial. Tr. 1603.

In September, 1989, petitioner acknowledged that amiodarone may cause blindness in a letter to a physician who had lost his vision while taking amiodarone:

> "*Optic neuropathy occurs in less than 1% of the patients requiring Cordarone therapy and may result in blindness.* Since the marketing of Cordarone, there have been 22 cases of optic neuropathy reported, of which 15 were from literature sources and 7 were from spontaneous sources. Once again, the risk-benefit ratio of discontinuing Cordarone therapy must be considered."

PX. 66, 81 (emphasis supplied).

Then, the first in a series of events occurred which gave petitioner notice that understating the risks of amiodarone is a violation of federal law punishable by criminal and civil sanctions which include seizing the drug

and enjoining further sales. In December, 1989, the FDA accused petitioner of violating federal law by making false and misleading statements about certain hazards of the drug in its labeling, and it threatened to seek criminal sanctions and enjoin sales of the drug. PX. 68A. Although none of the hazards in question related to ocular side effects of amiodarone, there was evidence that this letter should have caused petitioner to evaluate its product labeling carefully to make sure it provided adequate warnings against all known hazards associated with the drug, including vision loss. Tr. 481-83, 486, 493-94, 1016-18. As one witness put it, the 1989 letter should have "put the fear of the Lord" into petitioner. Tr. 483.

An internal memorandum in June, 1990, documented petitioner's concern about possible Senate hearings on promotional practices used in the pharmaceutical industry. PX. 78. Following the hearings in December, 1990, Senator Kennedy issued a press release accusing petitioner of a poor record of compliance with FDA rules on promotion. PX. 69. There was evidence that a prudent and safety-conscious pharmaceutical company, upon learning of Senator Kennedy's remarks, would have re-examined its labeling for amiodarone to determine whether it contained adequate warnings of all serious hazards known to be associated with its use. Tr. 493-94, 1028. Petitioner acknowledged at trial that Senator Kennedy's remarks and the Senate hearings should have spurred it to look carefully at whether the risks of the drug were being understated. Tr. 1583-84.

In July, 1991, petitioner acknowledged that optic neuritis and optic neuropathy are different conditions and that only the former is included in the labeling for amiodarone in the United States. PX. 62. In a memorandum to the European manufacturer of amiodarone, it described the difference between the two conditions as "significant":

> "Since neuritis denotes an inflammation of the optic nerve and neuropathy refers to the degeneration of the optic nerve, our medical monitors deemed the difference between these two conditions to be significant. . . ."

PX. 62; Tr. 1238-39. This admission makes a mockery of petitioner's contention below, renewed here, Pet. at 4, that the warning against optic neuritis was sufficient compliance with federal labeling regulations to immunize it from liability for punitive damages because the terms "optic neuritis" and "optic neuropathy" are different names for the same condition that can be used interchangeably. See A. 27a-28a.

In February, 1992, the FDA again accused petitioner of violating federal law by selective listing of side effects and minimizing other risks of amiodarone in promotional pieces. PX. 70. This letter should also have caused petitioner to look carefully at its labeling to verify it was adequately informing physicians and patients of the risks known to be associated with the drug. Tr. 1029.

By October, 1992, petitioner knew enough about the loss of vision associated with amiodarone to know it was usually "progressive." A physician employed by petitioner wrote:

> "[A Canadian physician] reported that one of her patients, a female, became blind in the left eye during the use of Cordarone 400 mg daily (five days per week). The appearance of blindness was rather sudden and not *progressive like usually seen with amiodarone.* She also became blind in the right eye within the following week."

PX. 67, 81; Tr. 1200 (emphasis supplied).

Respondent began amiodarone in August, 1994. PX. 1; Tr. 695. In addition to the medical literature document-

ing an association between the drug and the risk of vision loss, by 1994 petitioner had received 27 spontaneous adverse drug experience reports of amiodarone patients experiencing visual loss or optic nerve injury. PX. 81, 82. Between that time and trial, petitioner received 21 more such reports. PX. 83, and still did not warn of the risk. Tr. 1212.

The Court of Appeals of Oregon concluded that the evidence permitted the jury to find, by clear and convincing evidence,

> "that [petitioner] knew of the association between amiodarone use and optic neuropathy; that optic neuritis and optic neuropathy were not interchangeable diagnoses; that optic neuropathy could cause permanent vision loss; and that [petitioner] made a conscious choice not to warn of optic neuropathy."

A. 28a. The evidence also permitted the jury to find that petitioner's choice not to warn was motivated, at least in part, "by financial concerns related to its ability to market the product." *Id.* Under Oregon law, wanton disregard for the health, safety or welfare of others may be shown by evidence that a person acted with extraordinary disregard of or indifference to known or highly probable risks of harm to others. *Andor v. United Air Lines, Inc.*, 303 Or. 505, 517, 739 P.2d 18, 26 (1987). The court of appeals concluded that the evidence permitted the jury to find that petitioner's conduct exhibited such extraordinary disregard or indifference to warrant an award of punitive damages. A. 28a-29a. These conclusions rest solely on the application of Oregon law, and petitioner does not challenge them here.

Petitioner's assertion that there was no peer-reviewed scientific evidence that amiodarone can cause vision loss is untimely, misleading and irrelevant. Pet. at 3-4, 17. It is untimely because petitioner did not contend at trial

that there was insufficient evidence that amiodarone can cause vision loss to support the verdict.[5] It is misleading because, although causation was contested at trial, petitioner did not object to expert opinion testimony that amiodarone can cause permanent vision loss, Tr. 977, 1962-64, 1965-67, and in fact did cause respondent's blindness. Tr. 616-17, 644-45. It is also irrelevant because petitioner had known that vision loss was a risk associated with amiodarone at least seven years before the drug was prescribed for respondent, and reasonable evidence of an association between amiodarone and vision loss triggers the duty to warn, 21 CFR § 201.57(e), no matter what petitioner may have subjectively believed about the presence or absence of a causal link between amiodarone and vision loss.

Petitioner notes there was no evidence the FDA objected to the label's warning on optical side effects or asked that it be changed. Pet. at 8, 17. There was no need for such evidence. Aside from the fact that petitioner withheld information from the FDA about adverse ocular reactions associated with amiodarone, its duty to warn did not depend upon a request or approval from the FDA. Petitioner was required to warn against a serious adverse side effect of amiodarone as soon as it had reasonable evidence of its association with the drug. 21 CFR §§ 201.57(e), 314.70(b)(3) and 314.70(c)(2)(i).

REASONS FOR DENYING THE PETITION

Petitioner presents two issues. First, it argues that the mere existence of a state law permitting Oregon to share

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[5] Petitioner complains that the court of appeals declined to address the question of whether there was sufficient evidence to show that it knew or should have known amiodarone could cause optic neuropathy resulting in vision loss. Pet. at 17. The court of appeals could not consider this issue under Oregon's procedural rules, see *Vancil v. Poulson*, 236 Or. 314, 320-21, 388 P.2d 444, 448 (1964), because petitioner did not present it to the trial court. A. 27a.

in the recovery of punitive damages triggers the Eighth Amendment's prohibition against excessive fines and that this prohibition in the punitive damages context is stricter than the limits on punitive damages imposed by the Due Process Clause. This issue is hopelessly premature, does not warrant review by this Court, and is not well-presented in this case. Second, petitioner asserts that the trial court violated the Constitution by failing to make express findings concerning the propriety of the punitive damages award in this case. There is no substantial constitutional defect in the trial court's process, and the issue plainly does not warrant review by this Court.

I. THE PRESENT CASE IS NOT AN APPROPRIATE VEHICLE TO CONSIDER THE APPLICATION OF THE EXCESSIVE FINES CLAUSE TO AN AWARD OF PUNITIVE DAMAGES TO A PRIVATE PARTY.

A. Oregon's Split-Recovery Statute Has Been Declared Unconstitutional.

On July 7, 1999, while petitioner's petition for review of the court of appeals' decision was pending in the Supreme Court of Oregon, an Oregon trial court ruled that Or. Rev. Stat. § 18.540 violates the takings clause, article I, section 18, of the Constitution of Oregon. *Bocci v. State of Oregon*, Multnomah County Circuit Court case no. 9806-04765. See respondent's appendix (RA), 1a. The plaintiff in *Bocci* argued that Or. Rev. Stat. § 18.540 violates several provisions of the state and federal constitutions. The trial court addressed only the state takings claim. It ruled that a verdict awarding punitive damages to a party establishes a constitutionally protected property interest in the award with which the State may not interfere without just compensation.

> "The effect of Or. Rev. Stat. § 18.540 is solely to reallocate what would have been the plaintiff's, based on the verdict of the jury, and make it the property of the State. . . .

> "There is no dispute that but for the operation of Or. Rev. Stat. § 18.540, plaintiff would receive the entire punitive damage award. Consequently, the funds at issue are the plaintiff's property, taken by the State without just compensation."

RA. 6a, 7a. The State of Oregon appealed, and the matter is currently pending before the Court of Appeals of Oregon, case no. CA A107736. Until the issues in that case are resolved, the government's right to a share of punitive damages awarded to respondent is uncertain at best.

If the ruling in *Bocci* is affirmed on appeal, Oregon's Criminal Injuries Compensation Account will have no right to share in punitive damages awarded to a private party in a civil action. In that event, the excessive fines issue petitioner asks the Court to review will be moot. As the Court held in *Browning-Ferris,* the Excessive Fines Clause would not apply to the punitive damages awarded here because the government neither prosecuted the action nor would be entitled to a share of respondent's recovery. On the other hand, if the trial court's ruling in *Bocci* is reversed on appeal, the case will be remanded for consideration of the plaintiff's remaining state and federal constitutional contentions. In that event, it may be several years before the Criminal Injuries Compensation Account's right to a share of punitive damages awards in civil actions is settled. In the face of such fundamental and continuing uncertainty about the validity of Or. Rev. Stat. § 18.540 and of the government's right to share in the punitive damages awarded to a private party, the question of whether the Excessive Fines Clause applies to the punitive damages awarded to respondent is not ripe for review.

B. The Excessive Fines Issue Is Not Timely

Petitioner's claim that the punitive damages awarded to respondent is an excessive fine is not timely until the

State of Oregon is a party to litigation in which it can be addressed. Contrary to the posture of the litigation below, petitioner adds the State of Oregon as the first-named respondent, thereby implicitly acknowledging the deficiencies in this case as a vehicle for deciding whether the award even remotely implicates a serious Eighth Amendment issue. Oregon was dismissed from the action prior to judgment and was not a party to the appeal in the state courts. Hence, the State of Oregon is not a respondent in this Court, and its absence undermines any effort to decide the Eighth Amendment issue. Respondent has not violated the Eighth Amendment and there will be no excessive fines issue if he is allowed to keep the entire award.

If the State of Oregon acquires a share of the punitive damages awarded to respondent, petitioner may then assert any Eighth Amendment argument it has directly against the State. Litigation in that context can address whether the Excessive Fines Clause has been incorporated in the Due Process Clause of the Fourteenth Amendment, whether the Eighth Amendment applies to corporations, and whether the standards of excessiveness under the Eighth Amendment differ from those under the Due Process Clause. All of those questions must be answered before an Eighth Amendment violation can be declared with respect to the punitive damages award in this case. None of them, however, was briefed, argued or decided in the lower courts, and the State of Oregon has not been heard on any of them. With those issues still awaiting development, it makes no sense for this Court to intervene at this time.

Moreover, if the Court grants certiorari and any part of the award is invalidated as an excessive fine, respondent would suffer an injustice if the unconstitutionality of the Criminal Injuries Compensation Account's interest in punitive damages awards is eventually affirmed in *Bocci*.

In that event, the Criminal Injuries Compensation Account would not have a right to share in any punitive damages awarded to a private person in a civil action, the Eighth Amendment would be inapplicable after all, and respondent would be entitled to the full amount of punitive damages awarded to him.[6]

C. The Court of Appeals' Decision Adheres To The Rationale And Substance of *Browning-Ferris*.

Petitioner asserts that "Oregon has effectively overruled the substance of *Browning-Ferris*." Pet. at 11-12. Not so. The Court of Appeals of Oregon in this case adhered to its earlier decision in *Tenold v. Weyerhaeuser Co.*, 127 Or. App. 511, 873 P.2d 413 (1994) (en banc), *review dismissed upon settlement of case*, 321 Or. 561, 901 P.2d 859 (1995), and *Tenold* faithfully followed *Browning-Ferris*.

In *Tenold*, the court of appeals reviewed *Browning-Ferris*'s teachings about the history and purpose of the Eighth Amendment. It noted this Court's statements, 492 U.S. at 266, 268, that the Framers were concerned with "the potential for governmental abuse of its 'prosecutorial' power" and that the Excessive Fines Clause was "intended to limit only those fines *directly imposed by*, and payable to, the government." *Tenold*, 127 Or. App. at 528, 873 P.2d at 423 (emphasis added by the court of appeals). It quoted the following statement from *Browning-Ferris*:

> " '[This Court] has never held, or even intimated, that the Eighth Amendment serves as a check on the power of a jury to award damages in a civil case.

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[6] Respondent will file an action challenging the Criminal Injuries Compensation Account's right to share in punitive damages once there is a recovery on the judgment and the issue becomes ripe for adjudication. That action, like *Bocci*, will give the parties in interest an opportunity to raise these issues and the Oregon courts an opportunity to rule on them. The Court may be asked to address one or more of those issues in that case in a few years from now.

> Rather, our concerns in applying the Eighth Amendment have been with the criminal process and with *direct actions initiated by government* to inflict punishment. Awards of punitive damages do not implicate these concerns.' 492 U.S. at 259, 109 S. Ct. at 2912."

Tenold, 127 Or. App. at 528, 873 P.2d at 423 (emphasis added by the court of appeals). The court of appeals stated that even though Or. Rev. Stat. § 18.540 makes the government a "beneficiary" of a portion of a punitive damages award after a verdict has been entered, a private party, not the government, sued the defendants, and the jury awarded punitive damages to punish and deter them from engaging in future misconduct. Concluding that the purposes of the Eighth Amendment would not be furthered if applied under such circumstances, the court of appeals declined to hold that the punitive damages award in *Tenold* was subject to the Excessive Fines Clause. *Id.* at 528-29, 873 P.2d at 423-424. That conclusion, far from rejecting the rationale of *Browning-Ferris*, is rooted in it.

Petitioner's argument to the contrary rests on a distorted reading of *Browning-Ferris*. Petitioner asserts that the Court held that the Excessive Fines Clause "does not apply to punitive damages that are awarded *entirely* to a private party." Pet. at 8-9 (emphasis added). That, however, is not what the Court held. The Court expressed its holding in the following language:

> "Whatever the outer confines of the Clause's reach may be, we now decide only that it does not constrain an award of money damages in a civil suit when the government *neither* has prosecuted the action *nor* has any right to receive a share of the damages awarded."

492 U.S. at 264 (emphasis added). The precise holding of *Browning-Ferris* is that the Excessive Fines Clause does

not apply to an award of punitive damages in a civil action where the government does not prosecute the action and does not share in the damages awarded.

Petitioner asks the Court to focus on Oregon's right to receive a share of the punitive damages awarded to respondent and to ignore the fact that, as in *Browning-Ferris*, a private party rather than the government prosecuted the action. Selectively quoting from *Browning-Ferris*, 492 U.S. at 272, petitioner asserts that the Court "explicitly restricted its Eighth Amendment holding to cases in which 'the government has no share in the recovery'." Pet. at 9. Once again, that is not what the Court said. At the cited page, the Court rejected the argument that the amercements clause of the Magna Carta, which limited abuses of power by King John, is a basis for concluding that the Excessive Fines Clause limits the ability of a civil jury to award punitive damages. The concerns addressed by the amercements clause, the Court stated,

> "are clearly inapposite in a case *where a private party receives exemplary damages from another party*, and the government has no share in the recovery."

492 U.S. at 272 (emphasis added). The emphasized language underscores the holding of *Browning-Ferris*: the Excessive Fines Clause does not apply to an award of punitive damages in a civil action if a private party rather than the government seeks punitive damages and the government has no share in their recovery.

The Court in *Browning-Ferris* did not address the question of whether the Excessive Fines Clause applies to a punitive damages award in a civil action if a private party seeks punitive damages and the government *is* entitled to share in their recovery. Neither the holding nor the rationale of *Browning-Ferris* warrants the inference that the

Excessive Fines Clause applies in those circumstances, however. In fact, the rationale of *Browning-Ferris* supports the opposite conclusion.

The test of whether a sanction is subject to the Excessive Fines Clause is whether it is "a payment to a sovereign as punishment for some offense." *Browning-Ferris*, 492 U.S. at 265. When the Eighth Amendment was adopted and ratified, the term "offense" meant "offense against the King." *Id.* at 265, n. 6. Because petitioner was not charged with or found guilty of an offense, the Criminal Injuries Compensation Account's share of the punitive damages awarded to respondent is not a payment to the government as punishment for an offense. Hence, it is not a fine within the meaning of the Eighth Amendment. Moreover, the Framers intended the Excessive Fines Clause to limit "the ability of the sovereign to use its prosecutorial power, including the power to collect fines, for improper ends," *Browning-Ferris*, 492 U.S. at 267, not the power of a properly instructed jury to award punitive damages as permitted by state law to a private party in a civil action. Where the government does not sue to exact payment as punishment for some offense, it is not using its prosecutorial power. Therefore, no abuse of government prosecutorial power was even possible in this case.

The Court relied upon "precisely the lack of this incentive for abuse in holding that 'punitive damages' were not 'fines' within the meaning of the Eighth Amendment" in *Browning-Ferris*. *Harmelin v. Michigan*, 501 U.S. 957, 979, n. 9 (1991) (opinion of Scalia, J.). In accordance with Oregon law, *Honeywell v. Sterling Furniture Co.*, 310 Or. 206, 211, 797 P.2d 1019, 1021 (1990), the jury in this case was not told that any punitive damages it might award would be apportioned. The jury awarded damages to respondent, not the government. The prospect, unknown to the jury, that the Criminal Injuries Compen-

sation Account might receive a share of the punitive damages award neither invites, nor is an instance of, the abuse of governmental power that the Excessive Fines Clause was intended to constrain. Under the rationale of *Browning-Ferris*, the government's right as a non-party judgment creditor to a statutory percentage of respondent's punitive damages award is insufficient to subject the award to the Excessive Fines Clause.

D. This Court's Forfeiture Decisions Since *Browning-Ferris* Are Inapposite.

Petitioner's assertion that the court of appeals' decision violates this Court's Eighth Amendment rulings after *Browning-Ferris* is also mistaken. In *Alexander v. United States*, 509 U.S. 544, 558-59 (1993), the Court held that an *in personam* criminal forfeiture of businesses used in the commission of racketeering offenses and profits from racketeering activities was a fine within the meaning of the Excessive Fines Clause. Similarly, *United States v. Bajakajian*, 524 U.S. 321, 327-28 (1998), held that an *in personam* criminal forfeiture of currency being carried out of the country was subject to the Excessive Fines Clause because it was punishment for the offense of willful failure to report removal of more than $10,000 from the United States. In *Austin v. United States*, 509 U.S. 602, 620-22 (1993), the Court held that an *in rem* civil forfeiture under 21 U.S.C. §§ 881(a)(4) and (a)(7) of a mobile home and auto body shop used in the commission of a drug offense constituted "payment to a sovereign as punishment for some offense" and was therefore subject to the Excessive Fines Clause.

These cases are inapposite. In each of them, the government commenced a criminal or civil action seeking forfeiture of the instrumentalities or proceeds of criminal activity. Here, a private party, not the government, commenced a civil action to recover damages for physical injury, and punitive damages were not imposed as punish-

ment for an offense, but as punishment under the common law of Oregon for failure to warn of a known risk of serious bodily harm in wanton disregard for the safety and health of respondent and other users of amiodarone in Oregon. What was said of the government of Vermont in *Browning-Ferris* applies equally here:

> "Here the government . . . has not taken a positive step to punish, as it most obviously does in the criminal context, nor has it used the civil courts to extract large payments or forfeitures for the purpose of raising revenue or disabling some individual."

492 U.S. at 275. Other than obtaining a dismissal of the claims and cross-appeal against it, the State of Oregon has not used the civil courts in this case at all.

E. The Decision Below Does Not Conflict With Decisions Of Other Jurisdictions

Petitioner cites three decisions by state courts and three federal decisions in support of its contention that the decision of the court of appeals conflicts with decisions of other jurisdictions. However, none of those decisions held that the Excessive Fines Clause applies to an award of punitive damages in a civil action between private litigants where the government has a right to share in the award. There is, therefore, no split among lower courts on the question presented.

The Supreme Court of Georgia in *Mack Trucks, Inc. v. Conkle*, 263 Ga. 539, 545, 436 S.E.2d 635, 640 (1993), did not address the threshold question of whether the Eighth Amendment applies to punitive damages awards shared with the government. Without discussion or an express holding, the court simply assumed that it did, and ruled that a punitive damages award shared with the State under Georgia's split-recovery statute did not violate the Eighth Amendment.

In *McBride v. General Motors Corp.*, 737 F. Supp. 1563 (M.D. Ga. 1990), the district court did not hold the Excessive Fines Clause applies to an award of punitive damages in a civil case between private litigants. It held instead that Ga. Code Ann. § 51-12-5.(1)(e)(2), which makes the State of Georgia a non-party judgment creditor entitled to 75% of any award of punitive damages in a product liability action, is unconstitutional because, among other reasons, it violates the excessive fines clauses of the state and federal constitutions. *McBride*, 737 F. Supp. at 1579. This conclusion, if applied to Or. Rev. Stat. § 18.540, would invalidate Oregon's split-recovery statute, thereby undercutting petitioner's argument in this Court.

Far from conflicting with the decision below, the decision in *Spaur v. Owens-Corning Fiberglas Corp.*, 510 N.W.2d 854 (Iowa 1994), bolsters it. As applied in *Spaur*, Iowa's split-recovery statute required the defendant to pay approximately 75% of the punitive damages award after costs and fees to a civil reparations trust fund administered by the state court administrator. The court rejected the defendant's contention that because the trust fund is controlled and supervised by the state's executive counsel there is sufficient government sharing in the award to transform the plaintiff's product liability action into a government prosecution, thereby triggering the protections of the Excessive Fines Clause. The court noted that the trust fund is distinct from the general state treasury and that damage awards are not commingled with state revenues but are used only to support indigent civil litigation or insurance assistance programs. 510 N.W.2d at 868-69. Quoting *Browning-Ferris*, 492 U.S. at 275 ("The fact that punitive damages are imposed through the aegis of the courts and serve to advance governmental interests is insufficient to support the step petitioners ask us to take"), the court did not "find that the limited nature of the State's interest in a share of any punitive damage award

transforms [the split-recovery statute] into either a criminal or quasi-criminal statute." *Id.* at 869. Although the Eighth Circuit Court of Appeals expressed concern whether Iowa's split-recovery statute "may implicate . . . constitutional issues of due process and excessive fines," *Burke v. Deere & Co.* 6 F.3d 497, 512, n. 26 (8th Cir. 1993), it did not reach those issues in *Burke*.

The defendant in *Rodriguez v. Suzuki Motor Corp.*, 996 S.W.2d 47 (Mo. 1999) (en banc), did not contend that punitive damages awarded against it constituted an excessive fine. Rather, it challenged the constitutionality of Missouri's split-recovery statute, contending the statute violated the Excessive Fines or the Takings Clauses. *Id.* at 53. The Supreme Court of Missouri held that defendant's constitutional contentions gave it jurisdiction of defendant's appeal, but reversed the judgment on state law grounds without addressing the constitutional issues. *Ibid.*

The decision of the Court of Appeals of Oregon does not conflict with any of the foregoing decisions. Nor does it conflict with district court decisions applying the Excessive Fines Clauses to awards of punitive damages in *qui tam* actions under the False Claims Act. In *qui tam* actions, the government, or a private person on the government's behalf, brings suit against another to collect a civil penalty between $5,000 and $10,000 and up to three times the damages sustained by the United States as a result of fraud against the government. 31 U.S.C. § 3730. The action must be brought in the name of the government. 31 U.S.C. § 3730(b)(1). The government has the right to take over the action from the *qui tam* plaintiff and prosecute the action itself. 31 U.S.C. § 3730(b)(4). Whether the action is conducted by the *qui tam* plaintiff or by the government, any recovery is payable to the government except for an amount, limited by statute, that may be awarded to the *qui tam* plaintiff as reasonable

compensation for collecting the civil penalty and damages. 31 U.S.C. § 3730(d)(1) and (d)(2). *Qui tam* actions are thus prosecutions by or in the name of the government to collect civil penalties payable to the government, with the *qui tam* plaintiff receiving a share of the recovery. Those features are not present here. The fact that some district courts have applied the Excessive Fines Clause to False Claims Act penalties is therefore no basis for concluding that it applies to the punitive damages awarded to respondent and certainly no reason for this Court to grant review here.

II. THE TRIAL COURT'S FAILURE TO EXPLAIN ITS AFFIRMANCE OF THE PUNITIVE DAMAGES AWARD DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

A. Petitioner Forfeited Any Right It May Have Had To An Explanation Of The Trial Court's Ruling.

No one doubts the value of having a trial court explain the basis for a ruling on the record. Not only does this practice enable the parties to understand the reasons for the ruling, it facilitates appellate review. Assuming *arguendo* that the Due Process Clause gave petitioner the right to a statement of reasons on the record, that right can be forfeited. *Yakus v. United States*, 321 U.S. 414, 444-45 (1944) ("a constitutional right may be forfeited in . . . civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it"); *Interstate Busses Corp. v. Holyoke St. Ry. Co.*, 273 U.S. 45, 52 (1927) (bus company, having failed to apply for a license required by state law, lacked standing to attack the law as violating due process). In this case, it was.

When petitioner moved for a new trial on the ground that punitive damages were excessive, it requested that the proceedings be reported. At no time, however, did it request that the trial court articulate reasons for its rulings.

Having moved for review of the verdict under *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991), Pet. at 5, petitioner was aware of the significance of having a statement of reasons on the record, yet it failed to request one. It thereby forfeited whatever right it had to an explanation of the trial court's ruling.

B. The Trial Court's Failure To State Reasons For Its Ruling On Petitioner's Challenge To The Size Of The Punitive Damages Award Is Not A Constitutional Violation.

Petitioner's argument that the trial court did not provide the post-verdict review of punitive damages required by the Due Process Clause relies solely on the fact that its motions for judgment notwithstanding the verdict or for a new trial were denied by the trial court without explanation. Citing *Haslip*, and *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994), it contends it had a constitutional right to a statement of reasons from the trial court. Pet. at 9-10. Those cases do not support that contention.

In *Haslip*, the Court held that procedural protections provided by Alabama common law to ensure the reasonableness of punitive damages awards did not violate due process.[7] 499 U.S. at 23. In *Hammond v. City of Gadsden*, 493 So. 2d 1374, 1379 (Ala. 1986), the Supreme Court of Alabama established one such protection when it required trial courts "to reflect in the record the reasons for interfering with a jury verdict, or refusing to do so, on grounds of excessiveness of the damages." However, the Supreme Court of Alabama did not hold that due process *requires* such an explanation. Neither did this Court do so in *Haslip*. Because the trial court in *Haslip* had in fact explained its ruling on the record, 499 U.S. at 23, the issue was not presented.

---

[7] The Court did not find that the protections provided by Alabama law were necessary to comply with due process, but merely sufficient. *Morgan v. Woessner*, 997 F.2d 1244, 1256 (9th Cir. 1993).

When the issue was presented, a plurality of the Court declined to hold that a trial court's failure to explain its denial of a motion to reduce or eliminate a punitive damages award challenged as excessive was a constitutional violation. *TXO*, 509 U.S. at 465 (1993). Because *TXO* has already resolved the issue on which petitioner seeks review, the trial court's failure to state its reasons in this case does not present a substantial federal question.

Petitioner attempts to marginalize the ruling in *TXO*. It states that the plurality pointed out the trial judge "had orally *explained* his agreement with the jury's appraisal of the conduct." Pet. at 21 (emphasis added). That, however, is not what the plurality said. Justice Stevens noted that, although the trial judge did not articulate his reasons for upholding the award, he "did give counsel an *adequate hearing* on TXO's post-verdict motions, and during one colloquy *indicated his agreement* with the jury's appraisal of the egregious character of the conduct of TXO's executives." 509 U.S. at 465 (emphasis added). Two conclusions follow from this statement. First, an indication of agreement with the jury's assessment of the defendant's conduct is *not* an articulation of reasons for denying the motion. If it were, the question of whether the trial judge's failure to explain his ruling was a constitutional violation would not have arisen. Second, the failure to articulate reasons does not, as petitioner contends, render a hearing "inadequate." If it did, the post-verdict hearing afforded counsel in *TXO* would have been inadequate for that reason alone. Yet, the plurality characterized the hearing on TXO's motions as adequate, notwithstanding the fact that the trial judge did not explain the basis of his ruling.

The reminder in *Oberg*, 512 U.S. at 420, of *Haslip's* emphasis on the need for meaningful and adequate review by a trial court is not to the contrary. The issue decided in *Oberg* was "whether the Due Process Clause

requires judicial review of the amount of punitive damages awards," 512 U.S. at 420, not whether the Due Process Clause requires a reviewing court to articulate the reasons for its decision on the record. The latter issue was not discussed in *Oberg*.

Petitioner asserts that the Court of Appeals of Oregon ruled "that inadequate review by the trial court did not matter." Pet. at 19. That is a gross distortion of the court's ruling. What the court of appeals stated is that "because the constitutional issue is purely a legal issue, the trial court's reasoning in support of its decision, while helpful, has no direct bearing on our review." A. 35a. That statement is a simple application of Oregon's rule that an appellate court is not bound by the trial court's legal conclusions, *State v. Jacobus*, 318 Or. 234, 240, 864 P.2d 861, 864 (1993), which are reviewed for errors of law. *State v. Ehly*, 317 Or. 66, 75, 854 P.2d 421, 427 (1993).[8]

Petitioner similarly distorts the significance of a statement made by the Supreme Court of Oregon in *Oberg v. Honda Motor Co.*, 320 Or. 544, 888 P.2d 8 (1995), *cert. denied*, 517 U.S. 1219 (1996), after remand from this Court. After defining the standard of review to be applied in post-verdict and appellate review of the size of punitive damages awards, the court turned to the question of whether the case should be remanded to the trial court to apply the new standard in the first instance. It decided not to remand, for three reasons.

> "First, on remand from the Supreme Court of the United States, this court has resolved questions of law and has determined how Oregon law will com-

---

[8] The court of appeals in fact conducted a thorough, independent review of the punitive damages awarded to determine whether the amount of the award violated petitioner's right to substantive due process. A. 35a-42a. The court concluded that the award was not excessive under *BMW*, and petitioner does not challenge that ruling here.

> port with the requirements newly articulated by the Supreme Court. *We are in as good a position as would be the trial court to apply a legal standard to the evidence in the record.* Second, by applying that new standard to the facts in this case, we may be able to give some guidance to trial courts that will need to follow this standard in the future. Third, the judgment was entered more than five years ago; we see no reason to delay resolution of this case any longer."

320 Or. at 551-552, 888 P.2d at 12 (emphasis added). Oregon's appellate courts have never asserted that trial court review of a punitive damages award does not matter.

Finally, petitioner cites five failure-to-state-reasons cases in support of its claim that the decision in this case conflicts with holdings of other federal and state courts. Pet. at 22. All but one of the cited cases were decided before *TXO*, and none held that the Due Process Clause requires a trial court to explain its decision on the record where such an explanation was not requested.

In *American Employers Ins. v. Southern Seedling Serv.*, 931 F.2d 1453 (11th Cir. 1991), and *Robertson Oil Co. v. Phillips Petroleum Co.*, 930 F.2d 1342 (8th Cir. 1991), federal district courts, applying Alabama and Arkansas law, respectively, made summary rulings on excessiveness challenges to a punitive damages award. The cases were remanded with instructions to the district courts to place the reasons for their rulings on the record. Remand was not based on the ground that due process had been violated, but on the ground that the appellate courts were unable to tell whether the district court had reviewed the punitive damages award under state common law standards and principles. *American Employers*, 911 F.2d at 1464; *Robertson Oil Co.*, 930 F.2d at 1347.

In *Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S.E.2d 897 (1991), and *Gamble v. Stevenson*, 305

S.C. 104, 406 S.E.2d 350 (1991), the Supreme Courts of West Virginia and South Carolina, in response to *Haslip,* announced new common law procedures to guide juries and trial courts in awarding and reviewing, respectively, punitive damages. In each case, trial courts were required to explain the bases for their rulings on the record. Neither case held that this requirement was a matter of due process, however. The South Carolina Supreme Court specifically noted that while *Haslip* sustained Alabama's method for awarding punitive damages,

> "The Court . . . did not hold that each and every procedural protection furnished to Alabama defendants need be afforded to all defendants in all cases throughout the land. In our opinion, and as noted by *Haslip* itself, it is sufficient that the protections meet 'general concerns of reasonableness' and are followed by 'adequate guidance' from the trial court."

Gamble, 305 S.C. at 110, 406 S.E.2d at 354.

Finally, in *Coffey v. Fayette Tubular Products,* 929 S.W. 2d 326, 328 (Tenn. 1996), decided after *TXO,* the Supreme Court of Tennessee followed its earlier decision in *Hodges v. S.C. Toof & Co.,* 833 S.W. 2d 896 (Tenn. 1992), in which it had required, again as a matter of state law, trial courts conducting post-verdict reviews of punitive damage awards to set forth specific reasons for their rulings.

Unlike other states, Oregon does not expressly require its trial courts to provide such explanations. In sum, the fact that the trial court in this case failed to provide an unrequested explanation does not give rise to a substantial federal question and does not warrant further review.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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December 21, 1999

APPENDIX

APPENDIX

APPENDIX

IN THE CIRCUIT COURT
OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

Case No. 9806-04765

PAUL R. BOCCI, JR., guardian ad litem
for PAUL R. BOCCI, III, an incapacitated individual,
Plaintiff,

v.

STATE OF OREGON,
Defendant.

OPINION AND ORDER

INTRODUCTION

This matter comes before the court on plaintiff's and defendant's cross-motions for summary judgment. The pleadings raise purely legal issues and each party asserts it is entitled to judgment as a matter of law on each of plaintiff's claims.

The court determines that plaintiff is correct in his assertion that ORS 18.540 operates as a "taking" without just compensation, in violation of the Oregon Constitution, Article I, section 18. In light of this ruling, the court declines to reach the other grounds on which plaintiff asserts the punitive damages allocation statute is invalid.

BACKGROUND

In the underlying personal injury case, Multnomah County Circuit Court case number 9210-07050, plaintiff sued Key Pharmaceuticals, Inc., and others, for both compensatory and punitive damages. The jury returned a verdict finding defendants at fault (and plaintiff comparatively negligent) and determined that plaintiff's economic damages were $1,605,805, that his non-economic damages were $7,427,500. The jury also made the findings necessary to support an award of punitive damages and answered "What are the Plaintiff Paul R. Bocci, III's punitive damages?" with "35 million."

When it entered judgment, the trial court reduced plaintiff's economic and non-economic damages by his percentage of fault, reduced his compensatory damages by $250,000 (the amount of prior settlements) pursuant to ORS 18.455, and made the State of Oregon a judgment creditor "in an amount equal to one-half of the punitive damages awarded to Plaintiff after payment of attorney fees," pursuant to ORS 18.540.

The underlying case was settled while an appeal was pending, and the funds were placed in trust. The settlement was approved by the State of Oregon. The compensatory damages and 50% of the punitive damages have been released to plaintiff. The only dispute remaining is as to the other 50% of the punitive damages and the validity of ORS 18.540. That statute purports to allocate a portion of punitive damage awards to the Criminal Injuries Compensation Account.

Plaintiff brought this action against the State of Oregon seeking a declaration that ORS 18.540 is unconstitutional on an[y] number of grounds, and that he is entitled to the remaining 50% of the punitive damages.

This court was much assisted by the thorough briefing and clarifying arguments of counsel.

ANALYSIS

State "Takings" Claim

This court is mindful of the strong presumption that statutes are constitutional. Plaintiff has a heavy burden to clearly show the unconstitutionality of the statute to reach the outcome he seeks in this case. Nevertheless, it is the duty of the court to uphold the constitution as the supreme law of the land, and to protect the public if the legislature has overreached its constitutional bounds. This is the fundamental role of the judiciary in acting as a check upon and a balance against the other, co-equal, branches of government.

The 1993 [sic] version of the punitive damages allocation law, ORS 18.540, governed the underlying case. That statute provided:

> (1) Upon the entry of a judgment including an award of punitive damages, the Department of Justice shall become a judgment creditor as to the punitive damages portion of the award to which the Criminal Injuries Compensation Account is entitled pursuant to paragraph (c) of this subsection, and the punitive damage portion of the award shall be allocated as follows:
>
> > (a) The attorney for the prevailing party shall be paid the amount agreed upon between the attorney and the prevailing party.
> >
> > (b) One-half of the remainder shall be paid to the prevailing party.
> >
> > (c) One-half of the remainder shall be paid to the Criminal Injuries Compensation Account to

> be used for the purposes set forth in ORS chapter 147. However, if the prevailing party is a public entity, the amount otherwise payable to the Criminal Injuries Compensation Account shall be paid to the general fund of the public entity.

Oregon Constitution, Article I, Section 18, provides in pertinent part:

> Private property shall not be taken for public use . . . without just compensation[.]

Plaintiff contends that ORS 18.540 operates to "take" a portion of his award of punitive damages without compensation.

Defendants [sic] contends that nothing has been taken *from plaintiff*, because plaintiff had no cognizable, protectable property right to punitive damages. According to defendant, plaintiff has no vested right in the amount of punitive damages that may be awarded, and the legislature may limit or condition the recovery of punitive damages without impairing constitutional rights. Furthermore, the State contends that because the allocation statute was in existence before the plaintiff brought his claim, he could never have acquired an interest in or right to more than a 50% interest in whatever judgment was entered for punitive damages.

The contention that plaintiff could never have a property interest in more than 50% of the punitive damages because the allocation statute existed when he brought his claim is resolved by reference to *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 101 S.Ct. 446, 66 L.Ed.2d 358 (1980) and *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 118 S.Ct. 1925, 141 L.Ed.2d 174 (1998).

In *Webb's*, the Supreme Court held analyzed a state statute pursuant to which a county, in addition to a fee charged for services, took as its own the interest accruing on an interpleader fund deposited in the registry of the county court. The Court concluded that the statute caused an unconstitutional taking. The Florida Supreme Court had upheld the statute on the theory that the funds were public funds during the time they were held by the court, that the statute took only what it created, and the interest earned was not private property. The United States Supreme Court rejected this reasoning, characterizing it as *ipse dixit*.

In *Phillips* the respondents challenged a Texas Interest on Lawyers Trust Account (IOLTA) program, under which the interest earned on client funds deposited in lawyers' trust accounts was paid to foundations that finance legal services for low-income individuals. The issue before the Supreme Court was whether the interest was "private property" of either the attorney or client for purposes of the Takings Clause of the Fifth Amendment to the United States Constitution. Petitioners argued that respondents had no protectable right in the interest because, under Texas law, interest follows principal only if the interest is allowed by law or fixed by the parties. The Supreme Court rejected this reasoning, noting that interest on lawyer trust accounts *was allowed by Texas law*. The dispute concerned who owned the interest that was *actually earned*.

Defendant seeks to distinguish the *Webb's* and *Phillips* decisions on the grounds that they concern interest and the deeply-rooted notion of property rights that "interest follows principal." Punitive damages, the State argues, do not have the same relationship to compensatory damages as interest does to principal. The court agrees that there are significant differences. The distinction does not help

the State, however, where the issue is an attempt to change ownership rights that may arise in the future by legislative declaration.

Whether the legislature has the authority to cap or completely eliminate punitive damages as the State contends is debatable. The parties agree that punitive damages in Oregon are a creature of the common law. Oregon Constitution, Article VII (Amended) section 3. *See Lakin v. Senco Products, Inc.*, 144 Or. App. 52, 925 P.2d 107 (1996), *rev. allowed* 325 Or. 438 (1997); *Tenold v. Weyerhaeuser Co.*, 127 Or. App. 511, 873 P.2d 413 (1994). This court need not resolve that question, however, because cap or eliminate is not what the legislature purported to do in enacting ORS 18.540.

The statute does not abolish punitive damages, nor does it limit the amount of punitive damages a jury may award against a defendant or in favor of a plaintiff. No money stays in the tortfeasor's pocket as a result of the statute. The effect of ORS 18.540 is solely to reallocate what would have been the plaintiff's, based on the verdict of the jury, and make it the property of the State. This is a confiscation, not a limitation or elimination.

Perhaps the situation can be seen most clearly by focusing not on what the plaintiff "loses" by operation of the statute, but on what the State gains. In this case, if the State is correct and ORS 18.540 is valid, the State will acquire a large sum of money. That fund does not exist because of any effort by the State. The State had no role in initiating or prosecuting the action. To quote the Court of Appeals in its disposition of the Eighth Amendment "excessive fines" argument in *Tenold*: "In this case, a private party brought an action against defendants, and the jury directly imposed the judgment [sic] against defendants to deter future misconduct." 127 Or.App. at 529.

After the verdict, the funds are not rightfully the defendants', because the jury has awarded punitive damages against them. According to our Supreme Court: "There is nothing that we have found in the language or the legislative history of ORS 18.540 indicating the legislature intended to change the purposes behind punitive damage awards when it enacted a new mandate for the distribution of the proceeds of such awards." *Honeywell v. Sterling Furniture Co.*, 310 Or. 206, 210-11, 797 P.2d 1019 (1990) (holding it was reversible error to instruct the jury on the distribution to the state of a portion [of] punitive damages awarded because it would invite the jury to award the damages for the impermissible purpose of enhancing the Criminal Injuries Compensation Account).

There is no dispute that but for the operation of ORS 18.540, plaintiff would receive the entire punitive damage award. Consequently, the funds at issue are the plaintiff's property, taken by the State without just compensation.

Judgment shall be entered for plaintiff.

Dated this 7th day of July, 1999.

/s/ _____

JANICE R. WILSON
Circuit Court Judge

(3)

No. 99-784

Supreme Court, U.S.
FILED
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CLERK

IN THE
Supreme Court of the United States

AMERICAN HOME PRODUCTS CORPORATION,
Petitioner,

v.

STATE OF OREGON and DOUGLAS J. AXEN,
Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals of Oregon

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IN THE

Supreme Court of the United States

No. 99-784

AMERICAN HOME PRODUCTS CORPORATION,
Petitioner,
v.
STATE OF OREGON and DOUGLAS J. AXEN,
Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals of Oregon

REPLY TO BRIEF IN OPPOSITION

I. THIS CASE SQUARELY PRESENTS THE EIGHTH AMENDMENT ISSUE.

Whether the Eighth Amendment limits punitive-damage awards in which a State shares is an unsettled issue this Court itself pointed out more than ten years ago. *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 272, 275 n.21 (1989); see also *id.* at 298-99 (opinion of O'Connor, J., joined by Stevens, J.); see Pet. Cert. 10-12. The appropriateness and need for this Court to decide it has been noted many times by commentators. See Pet. Cert. 23-24.

The Brief in Opposition argues that the Eighth Amendment should not apply when a State did not initiate the proceeding that produced the punitive award. Br. Opp. 17-22. That was indeed what the court below, following

Oregon precedent, held. Pet. Cert. App. 46a-47a. And that is exactly the undecided question the petition presents. Respondent's arguments for distinguishing the reasoning of cases like *Browning-Ferris, Alexander* v. *United States*, 509 U.S. 544, 558 (1993), *Hudson* v. *United States*, 522 U.S. 93, 103 (1997), and *United States* v. *Bajakajian*, 524 U.S. 321, 327 (1998), go to the merits. They do not affect the need for this Court's review, at which time respondent's proposed distinctions can be considered.

The Oregon court's conflict with those decisions of this Court is reason enough to grant certiorari. In addition, there is broad disagreement in reasoning and results in the lower courts. The Brief in Opposition is unable to do more than quarrel with the reasoning of the Georgia Supreme Court's holding that the Eighth Amendment indeed applies when a State shares in a punitive-damage award. See, *e.g.*, Br. Opp. 22 (dismissing *Mack Trucks, Inc.* v. *Conkle*, 263 Ga. 539, 545, 436 S.E.2d 635, 640 (1993), on ground that "the court simply assumed that it did"). Other state and federal courts have recognized a "real and substantial" constitutional question. *Rodriguez* v. *Suzuki Motor Corp.*, 996 S.W.2d 47, 52-53 (Mo. 1999); see cases cited at Pet. Cert. 13-14. *Spaur* v. *Owens-Corning Fiberglas Corp.*, 510 N.W.2d 854 (Iowa 1994), on which respondent seeks to rely, Br. Opp. 23, assumed that the Eighth Amendment would apply but for the allocation of the State's share to an independent trust fund.

II. THE CONFLICT WITH RESPECT TO TRIAL-COURT REVIEW IS CLEAR.

Respondent Axen acknowledges that the Oregon Court of Appeals affirmed the trial court's entry of the punitive award "without explanation." Br. Opp. 26. Respondent even concedes "the significance of having a statement of reasons on the record." *Id.*

Faced with the conflict with *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1 (1991), and *Honda Motor Co.* v. *Oberg*, 512 U.S. 415 (1994), respondent argues that the requirement of articulated reasons was rejected in a plurality opinion in *TXO Production Corp.* v. *Alliance Resources Corp.*, 509 U.S. 443, 464-65 (1993) (opinion of Stevens, J.). Br. Opp. 27. That reading of that opinion is incorrect. See Pet. Cert. 21. And respondent has no answer for this Court's subsequent decision in *Honda*, which he concedes reiterated *Haslip*'s requirement of "meaningful" and "adequate" trial-court review. *Haslip*, 499 U.S. at 20; *Honda*, 512 U.S. at 420; see Br. Opp. 27-28.

Respondent also argues that, in addition to specifically requesting the trial court to provide the due process protections required by *Haslip*, petitioner was further required, separately and redundantly, to ask the trial court to explain its ruling, lest petitioner "forfeit[] whatever right it had to an explanation." Br. Opp. 26. The Court of Appeals certainly did not adopt such reasoning. If that were the law, it no doubt would come as a surprise to the many courts that have held without any such added formalism that due process requires trial courts to state their analysis in reviewing punitive-damage awards under *Haslip*. Petitioner specifically invoked *Haslip*; it was not required to move for reconsideration to preserve its right to due process, and the Oregon court did not hold that it was.

The Court of Appeals here plainly ruled instead that although "AHP argues that due process requires a trial court to make findings of fact and state its conclusions of law on the record," nevertheless "We disagree." Pet. Cert. App. 34a. The court was following Oregon precedent. See *Oberg* v. *Honda Motor Co.*, 322 Or. 544, 552 & n.9, 888 P.2d 8, 12 & n.9 (1995) (holding on remand from this Court that "[w]e are in as good a position as would be the trial court to apply a legal standard to the evidence in the record," "even though the trial court has

not done so"), *cert. denied*, 517 U.S. 1219 (1996). But "meaningful" review by the trial court is an essential component of the due process guarantee. It is clear that with respect to the due process requirements of trial-court review of punitive damages, Oregon is marching to its own drummer.[1]

III. RESPONDENT AXEN'S PROCEDURAL ARGUMENTS ARE INSUBSTANTIAL.

A. The Excessive Fines Clause Issue Was Raised in and Decided by the Oregon Courts.

There is no basis whatsoever for respondent Axen's representation to this Court that "none of them [issues of Eighth Amendment applicability and scope] was briefed, argued or decided in the lower courts." Br. Opp. 16. First, there can be no doubt that the Oregon Court of Appeals specifically considered and rejected petitioner's claim that it was entitled to the protection of the Eighth Amendment's Excessive Fines Clause, made applicable to the states by the Fourteenth Amendment. Pet. Cert. App. 42a n.28, 46a-47a. That issue is squarely and properly before this Court.

Moreover, petitioner's Eighth Amendment argument was raised in every one of the three Oregon courts: in post-trial motions in the trial court; in its opening brief in the Court of Appeals; in its reply brief in the Court of Appeals; at oral argument in the Court of Appeals; in its petition for reconsideration in the Court of Appeals; and in its petition for review to the Supreme Court of Oregon.[2] Indeed, respondent overlooks that he himself ar-

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[1] The issue of the scope and nature of appellate review of punitive-damage awards is also presented in *Orthofix S.R.L.* v. *EBI Medical Systems, Inc.*, No. 99-687, currently pending on petition for certiorari.

[2] See Defendant's Memorandum in Support of Alternative Motions for Judgment Notwithstanding the Verdict and New Trial, Circuit Court for Multnomah County, March 21, 1997, at 16-17; Appellant's Brief, Oregon Court of Appeals, Feb. 2, 1998, at 46-48;

gued in response in the Oregon Court of Appeals not only that Eighth Amendment protections should not apply, but also that "the excessive fines clause does not apply to the states through the due process clause." Respondents' Brief, Oregon Court of Appeals, May 27, 1998, at 49.

B. The Petition Is Timely.

Respondent Axen makes the curious argument that although final judgment for $20,000,000 punitive damages has been entered against petitioner, and petitioner has exhausted all review available in the Oregon court system, nevertheless somehow the petition is "not timely," Br. Op. 15, "not ripe," *id.*, indeed, "hopelessly premature," *id.* at 14. He argues that "[i]f the State of Oregon acquires a share of the punitive damages awarded to respondent, petitioner may then assert any Eighth Amendment argument it has directly against the State." Br. Opp. 15.

That assertion overlooks several realities: (1) There is no "if." The State already has been awarded a share of the punitive judgment, and that final judgment has been affirmed on appeal. See Pet. Cert. App. 53a, 42a, 47a, 1a. (2) Petitioner's Eighth Amendment right to the protection of the Excessive Fines Clause in any proceeding in which the State shares in the punishment applies to the review and validity of the punitive judgment as a whole, and not just to a portion. (3) If respondent really means to suggest, *cf.* Br. Opp. 16 and 17 n.6, that certiorari should not lie until the judgment has been collected, that is answered by the familiar provisions of 28 U.S.C. § 1257 and 2101(c) and Rule 13.3, by which this

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Appellant's Reply Brief, Oregon Court of Appeals, July 28, 1998, at 14; Transcript of Oral Argument, Oregon Court of Appeals, Oct. 22, 1998, at 21-22; Petition for Reconsideration, Oregon Court of Appeals, Feb. 23, 1999, at 12; Petition for Review, Supreme Court of Oregon, May 25, 1999, at 45-46.

Court reviews final "judgments." See, *e.g.*, *Herb* v. *Pitcairn*, 324 U.S. 117, 126 (1945); *Market St. Ry.* v. *Railroad Comm'n*, 324 U.S. 548, 552 (1945) ("When the case is decided, the time to seek our review begins to run").[3]

C. Whether the State Participates as a Party Is Immaterial.

Respondent Axen's suggestion, Br. Opp. 15-16, that somehow it matters whether the State participates as a party in this Court is a complete red herring. The questions presented in the petition for certiorari are not affected by whether the State is labeled a party, or whether the State chooses to participate. Petitioner is not challenging the constitutionality of Or. Rev. Stat. § 18.540. Petitioner's Eighth Amendment claim, based on *Browning-Ferris*, is that if as here a State enacts a structure allocating punitive awards to itself, all punitive damages awarded are subject to the Excessive Fines Clause. The Oregon Court of Appeals held to the contrary, Pet. Cert. App. 46a-47a, and that is the issue presented in the petition. And of course the petition's second question, as to

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[3] Respondent Axen's suggestion that someday he may bring a separate civil action against the State to challenge Or. Rev. Stat. § 18.540 as an unconstitutional taking from him, Br. Opp. 17 n.6, is irrelevant to petitioner's Eighth Amendment claims, as well as speculative. The record shows that so far respondent has voluntarily dismissed such a challenge in this case, instead entering a stipulation with the State (which petitioner did not join, see p. 7a, *infra*) reciting that jurisdiction of his own cross-appeal against the State was lacking. See Pet. Cert. App. 3a n.1. The Oregon court adopted the State and Axen's request for dismissal because "the State of Oregon, in its capacity as a party with an interest in punitive damages collected by plaintiff" had not been a party at the time the trial court's judgment was entered. P. 8a, *infra*. Petitioner is unaware of what if any understandings may exist between the State and respondent; clearly they both seek in coordinated filings to have this petition for certiorari denied.

the due process requirement of trial-court review, does not depend on whether a State is involved in the litigation at all.[4]

The Solicitor General of Oregon wrote to the Clerk of this Court on December 23, 1999, that the State now considers itself "a non-party judgment creditor" but "not a party in this matter." See pp. 4a, 5a, *infra*.[5] That is contrary to the State's previously stated position.[6] There is of course no requirement that the State file a brief in opposition, Supreme Court Rule 15.1, and presumably any party may waive whatever rights it has. Notably the State has not, however, filed any waiver of the judgment awarded to it. Indeed, the State's most recent letter concludes by saying that "it does have an interest in the issues presented" and "urges this Court to deny the petition." Pp. 5a, 6a, *infra*.[7] By its own acknowledgment and

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[4] If, as respondent asserts, the petition somehow were "not timely until the State of Oregon is a party," Br. Opp. 15-16, then in any case in which punitive damages were awarded to a State, the judgment could escape Eighth Amendment review by the device of the State's declaring itself not a party.

[5] The characterization "non-party judgment creditor," which respondent Axen echoes, Br. Opp. 4, 21, borders on an oxymoron.

[6] After the trial court entered its judgment, and in response to the notice of appeal, the Assistant Attorney General of Oregon wrote to petitioner's counsel:

> "I represent the Oregon Department of Justice Criminal Injuries Compensation Account, a judgment creditor as to the punitive damages portion of the award in the above matter. . . .
>
> "*The Department of Justice is now an interested party in this proceeding.* I have received a copy of the Notice of Appeal. Please send all future pleadings, notices, briefs and similar documents to my attention at the address given above."

Letter of Assistant Attorney General Kristin N. Preston, May 7, 1997 (emphasis supplied), pp. 1a-2a, *infra*. Petitioner complied.

[7] Respondent Axen nevertheless appears to criticize petitioner for having listed the State as a respondent. See Br. Opp. 4, 16. Under

by the judgment, the State is at the very least a real party in interest.

D. An Unreviewed Oregon Trial-Court Ruling in Another Case Does Not Affect Certiorari.

Respondent Axen argues that because a trial judge in a different case held the Oregon statute unconstitutional as a taking from private plaintiffs, in an unreviewed decision just beginning Oregon's lengthy appellate process, petitioner should be denied review by this Court of the issues squarely raised in this petition. Such a ruling does not affect this Court's review.

—Respondent does not even attempt to claim that an unpublished and unreviewed ruling by a single judge in a trial court has any binding effect in other cases. This Court has several times recognized the non-precedential effect of state trial-court rulings. *Cf., e.g., Commissioner* v. *Estate of Bosch*, 388 U.S. 456, 465 (1967); *King* v. *Order of United Commercial Travelers*, 333 U.S. 153, 160-61 (1948).

—Or. Rev. Stat. § 18.540 has been applied and approved by the Supreme Court and Court of Appeals of Oregon in many cases, and there is no reason to expect a

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the Rules of this Court, petitioner was required to do so. Rule 12.6 provides that "[a]ll parties to the proceeding in the court whose judgment is sought to be reviewed are deemed parties . . . unless the petitioner notifies the Clerk of this Court in writing of the petitioner's belief that one or more of the parties below have no interest in the outcome of the petition." Petitioner could scarcely have represented under Rule 12.6 that the State has no interest; judgment was entered in this case in favor of both the State and respondent Axen, Pet. Cert. App. 53a; the state was listed as a party in the Court of Appeals, Pet. Cert. App. 2a; the State had emphatically informed petitioner that by the entry of judgment it had become a party, see n. 6, *supra*; and if certiorari is granted and the judgment, which petitioner challenges as constitutionally excessive, ultimately is reversed, the State will not receive several million dollars.

trial judge's novel ruling to be adopted by them. *Cf. Delashmutt* v. *Myers*, 329 Or. 516, —— P.2d —— (1999) ("On several occasions . . . this court has approved, against a variety of constitutional challenges, legislative choices to limit damages in some kinds of civil actions"). See generally *Tenold* v. *Weyerhaeuser Co.*, 127 Or. App. 511, 873 P.2d 413 (1994), *review dismissed*, 321 Or. 561, 901 P.2d 859 (1995) (cited with approval in the decision below, see Pet. Cert. App. 46a-47a); *Honeywell* v. *Sterling Furniture Co.*, 310 Or. 206, 210-11, 797 P.2d 1019, 1021 (1990); *Butler* v. *State of Oregon Dep't of Corrections*, 138 Or. App. 190, 194, 909 P.2d 163, 166 (1995); see also *In re Stein*, 236 B.R. 34, 37 (D. Or. Bky. 1999).

—The State of Oregon is defending the constitutionality of Or. Rev. Stat. § 18.540 in the very case respondent cites. The State has not acquiesced in that trial judge's ruling, and continues to apply Or. Rev. Stat. § 18.540 to obtain its share of punitive-damage awards.

—Respondent seeks to invoke several layers of speculation about the distant future. Even if someday Oregon's highest court were to reject Or. Rev. Stat. § 18.540, or if someday the Oregon legislature were to repeal it, that would not alter the need for review. Respondent does not challenge the fact that similar provisions exist in a number of States, and cannot deny that several courts and many commentators have noted, as did this Court in *Browning-Ferris*, that for a State to be allocated a portion of punitive damages raises a serious issue of compliance with the Excessive Fines Clause.[8]

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[8] The first thirteen pages of the Brief in Opposition are devoted to a review of the trial evidence, closely resembling respondent's closing argument to the jury. Because the two issues raised in the petition concern only the requirements of review under the Eighth and Fourteenth Amendments, petitioner will not burden the Court

CONCLUSION

For the reasons stated herein and in the petition, certiorari should be granted.

Respectfully submitted,

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January 5, 2000

* Counsel of Record

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in this reply by listing the serious errors and omissions in respondent's account. See generally Pet. Cert. 2-4, 17-18.

ADDENDUM A

THEODORE R. KULONGOSKI
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[State of Oregon Seal]

DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

May 7, 1997

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Portland, OR 97205

Re: *Axen v. American Home Products Corporation*
DOJ File No. 137-760-GH0295-97

Dear Counsel:

I represent the Oregon Department of Justice Criminal Injuries Compensation Account, a judgment creditor as to the punitive damages portion of the award in the above matter. *See* ORS 18.540 (former). The purpose of this letter is to outline the Department of Justice's policy with respect to future actions in this case.

The Department of Justice is now an interested party in this proceeding. I have received a copy of the Notice

of Appeal. Please send all future pleadings, notices, briefs and similar documents to my attention at the address given above.

The judgment debtor in this matter should pay the Criminal Injuries Compensation Account's portion of the award directly to the Department of Justice, rather than to another judgment creditor. ORS 18.540 authorizes the Department of Justice to seek reimbursement from other judgment creditors who have received a portion of the Department of Justice's share of the punitive damages award.

The judgment debtor should make payment payable to the *Criminal Injuries Compensation Account*. Payment should be mailed to the Department of Justice, Crime Victims Assistance Section, 1162 Court Street NE, Salem, OR 97310.

Finally, I will outline the Department of Justice's policy regarding settlement of punitive damages cases. In each case, we first calculate what percentage of the entire judgment would go to the Department of Justice. We are willing to agree to any settlement which gives us the same proportionate share. For example, if under a total judgment for $100,000, DOJ's share would be $20,000, we will approve any settlement amount if we receive 20 percent of the settlement. So if the parties agree to settle the case for a total of $40,000 DOJ will agree to the settlement if we receive $8,000. It does not matter how the parties designate the settlement payment. Even if the parties agree between them that the entire settlement is for economic damages, the Department of Justice will only agree to a settlement if we receive our proportionate share as described above. Any deviations from this policy must be approved by the Deputy Attorney General, David Schuman, and are seldom done.

Please contact me if you have any questions. Thank you for your attention to this matter.

Sincerely,

/s/ Kristin N. Preston
KRISTIN N. PRESTON
Assistant Attorney General
Human Services Section

c: Jason Barber, Crime Victims Assistance Section
Christopher McCracken
Rodney Norton

ADDENDUM B

HARDY MYERS
Attorney General

DAVID SCHUMAN
Deputy Attorney General

[State of Oregon Seal]

DEPARTMENT OF JUSTICE
APPELLATE DIVISION

December 23, 1999

Clerk
Supreme Court of the United States
One First Street NE
Washington, D.C. 20543

Supreme Court Case No. 99-784
American Home Products Corporation v. State of Oregon

Dear Clerk:

Petitioner American Home Products Corporation filed a petition for a writ of certiorari naming the State of Oregon as a respondent. For reasons set forth below and in respondent Axen's brief in opposition, the State of Oregon is not a party in this matter. Therefore, the State will not be filing a brief in opposition to the petition.

In the trial court, the State of Oregon was named as a defendant but was dismissed before trial and took no further part in the proceedings. Judgment was entered for respondent (plaintiff below) Axen. Because the jury awarded Axen punitive damages, and under Oregon law the State shares in any punitive damages recovery, the State was named as a creditor in the judgment.

American Home Products (defendant below) appealed the judgment to the Oregon Court of Appeals. Under Oregon practice, the notice of appeal must designate all of the parties named in the trial court and indicate which of those parties are adverse to the appellant on appeal. Or. Rev. Stat. § 19.250(1). In its notice, American Home Products designated the State of Oregon as a party in the trial court, but appropriately did not designate the State as an adverse party on appeal.

Axen cross-appealed from the judgment entered in the trial court to the extent that the judgment made the state a judgment creditor as to a portion of the punitive damages. Axen challenged as unconstitutional Or. Rev. Stat. § 18.540, the statute that makes the State automatically a judgment creditor with an interest in any award of punitive damages. Axen designated the State as an adverse party in its notice on appeal.

The State and American Home Products [*sic*—Axen] jointly moved to dismiss Axen's cross-apeal for lack of jurisdiction. The Oregon Court of Appeals granted that motion, concluding that no justiciable controversy existed among the parties to the case as to the question of the sharing of the punitive damages award. Moreover, the court concluded that the question of whether Axen was required to share the punitive damages award with the State could be resolved in further proceedings once the judgment became final following the appeal. A copy of the court's order dismissing Axen's cross-appeal is attached to this letter. The State thereafter did not participate in the appeal. Its sole interest in this matter is as a non-party judgment creditor with respect to a portion of the punitive damages awarded to the respondent.

While the State is not a party to this proceeding at this stage, it does have an interest in the issues presented. For

the reasons set forth in Axen's brief in opposition, the State urges this Court to deny the petition.

Very truly yours,

/s/ Michael D. Reynolds
MICHAEL D. REYNOLDS
Solicitor General
State of Oregon

Cc: John G. Kester, attorney for petitioner
John Paul Graff, attorney for respondents
Jeffrey B. Wihtol, attorney for respondents
Walter Sweek, attorney for Wal-Mart Stores, Inc.

IN THE COURT OF APPEALS
OF THE STATE OF OREGON

Multnomah County Circuit Court No. 9509-06363

CA A97249

DOUGLAS J. AXEN,
Plaintiff-Respondent,
Cross-Appelleant,

and

SANDRA AXEN,
Plaintiff-Respondent,

v.

AMERICAN HOME PRODUCTS CORPORATION through its pharmaceutical division, Wyeth-Ayerst Laboratories,
Defendant-Appellant,
Cross-Respondent,

STATE OF OREGON,
Defendant-
Cross-Respondent,

and

WAL-MART STORES, INC.,
Defendant.

ORDER DISMISSING CROSS-APPEAL

The State of Oregon and plaintiff Douglas Axen have filed a joint motion, and amended motion, for dismissal, for lack of jurisdiction, of plaintiff's cross-appeal from that portion of the judgment giving the State of Oregon an interest in the punitive damages awarded by the trial

court on the ground that ORS 18.540, which makes the State of Oregon a judgment creditor with an interest in an award of punitive damages, is unconstitutional.

The court determines that the State of Oregon, in its capacity as a party with an interest in punitive damages collected by plaintiff, was not a party to the case when the trial court entered the judgment that included punitive damages. Defendants American Home Products Corporation, Wal-Mart Stores, Inc., and the State of Oregon in its capacity as a named defendant in the action are not adverse to plaintiff with respect to the matter of the interest of the State of Oregon in any punitive damages collected by plaintiff or plaintiff's contention that ORS 18.540 is unconstitutional. Because there was no adverse party as to the State's interest in an award of punitive damages matter, there was no justiciable controversy as to that issue and there can be no appellate jurisdiction without a justiciable controversy. *Oregon Medical Assn. v. Rawls*, 281 Or 293, 574 P2d 1103 (1978); *Brumnett v. Psychiatric Sec. Review Bd.*, 315 Or 402, 848 P2d 1194 (1993).

Further, the court determines that an alternative and adequate forum exists in the trial court for the resolution of any potential controversy between plaintiff and the State of Oregon in its capacity as a judgment creditor of the award of punitive damages if and when: (1) an award of punitive damages is affirmed on appeal; (2) the judgment becomes final following this appeal; and (3) plaintiff collects or seeks to collect any punitive damages and the State of Oregon asserts an interest in those damages. *Barger v. Taylor*, 30 Or App 228, 42 P 615 (1895). The motion to dismiss the cross-appeal is granted. The case title is amended as set forth in the attachment to this order.

The parties have filed a stipulated motion to supplement the record with a transcript of the deposition of Dr. Jack McAnulty, a copy of which is attached to the motion. The motion is granted.

Respondent's brief is due 28 days from the date of this order.

Cross-appeal dismissed; no costs allowed.

/s/ Mary J. Deits
Chief Judge

Apr. 15, 1998
Date

c: John Paul Graff
Jeffrey B. Wihtol
Kathryn Hall Clarke
Mary Williams
Karen O'Kasey
Multnomah County Circuit Court

REPLIES SHOULD BE DIRECTED TO THE STATE COURT ADMINISTRATOR, RECORDS SECTION, SUPREME COURT BUILDING, 1163 STATE STREET, SALEM, OR 97310